

At the Board of Trustees' November 17, 2016 meeting, the Commission submitted 38 rules for adoption and 32 rules for an additional public comment circulation.

Of the rules submitted for public comment, Rules 1.9 and 1.13 were amended by the Board.

Of the rules submitted for adoption, Rules 5.3.1, 5.6, and 8.1.1 were amended by the Board. The changes made to Rules 5.3.1 and 5.6 were substantive and therefore are being circulated for an additional 45-day public comment.

The changes made by the Board are reflected in this attachment.



**PROPOSED RULE OF PROFESSIONAL CONDUCT 1.9**  
**(Current Rule 3-310(E))**  
**Duties to Former Clients**

**EXECUTIVE SUMMARY**

The Commission for the Revision of the Rules of Professional Conduct (“Commission”) has evaluated current rule 3-310 (Avoiding the Representation of Adverse Interests) in accordance with the Commission Charter, with a focus on the function of the rule as a disciplinary standard, and with the understanding that the rule comments should be included only when necessary to explain a rule and not for providing aspirational guidance. In addition, the Commission considered the national standard of the American Bar Association (“ABA”) counterparts, a series of rules that address conflicts of interest as they might arise in a number of different situations: Model Rules 1.7 (Current Client Conflicts); 1.8(f) (third party payments); 1.8(g) (aggregate settlements); and 1.9 (Duties To Former Clients).

The result of the Commission's evaluation is a two-fold recommendation for implementing:

- (1) the Model Rules’ framework of having separate rules that regulate different conflicts interest situations: proposed rules 1.7 (current clients), 1.8.6 (payments from one other than client), 1.8.7 (aggregate settlements) and 1.9 (former clients); and
- (2) proposed Rule 1.9 (duties to former clients), which regulates conflicts situations that are currently regulated under rule 3-310(E). Proposed rule 1.9 largely adheres to the internal framework of Model Rule 1.9, which addresses duties to former client in three separate provisions, MR 1.9(a) through (c), rather than the current rule’s approach to address those duties in a single provision, 3-310(E).

Proposed rule 1.9 has been adopted by the Commission for submission to the Board of Trustees for public comment authorization. A final recommended rule will follow the public comment process.

1. **Recommendation of the ABA Model Rule Conflicts Framework.** The Model Rule Framework has (i) separate rules that regulate the different conflicts of interest situations currently regulated by a single rule, rule 3-310: proposed rules 1.7 (current clients), 1.8.6 (payments from one other than client), 1.8.7 (aggregate settlements) and 1.9 (former clients); and (ii) several rules to address concepts that are currently found in case law but not in the Rules of Professional Conduct: proposed rules 1.10 (general rule of imputation of conflicts and ethical screening in private firm context), 1.11 (conflicts involving former and current government lawyers), and 1.12 (conflicts involving former judges, third party neutrals, and their staffs).<sup>1</sup>

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<sup>1</sup> Every other jurisdiction in the country has adopted the ABA conflicts rules framework. In addition to the identified provisions, the Model Rules also include Model Rule 1.8, which includes eight provisions in addition to paragraphs (d) and (f) that cover conflicts situations addressed by standalone California Rules (e.g., MR 1.8(a) is covered by California Rule 3-300 [Avoiding Interests Adverse To A Client] and MR 1.8(e) is covered by California Rule 4-210 [Payment of Personal or Business Expenses By Or For A Client]).

Further, the Model Rules also deal with concepts that are addressed by case law in California: Model Rules 1.10 (Imputation of Conflicts and Ethical Screening); 1.11 (Conflicts Involving Government Officers and Employees); and 1.12 (Conflicts Involving Former Judges and Judicial Employees).

2. **Recommendation of addressing duties to former clients in three separate provisions that track the organization of Model Rule 1.9.** There are three separate provisions, each of which addresses a different aspect of duties owed a former client or recognizes the different ways in which a lawyer can incur duties to a client that survive the lawyer-client relationship. The Commission determined that implementing Rule 1.9 will help make a lawyer's duties to a former client more apparent, thus promoting compliance with the rule. This is particularly important in the context of former clients. Although the principal value at issue in conflicts of interest involving former clients is confidentiality, there is a residual duty of loyalty that the Supreme Court has recognized. (See, e.g., *Wutchumna Water Co. v. Bailey* (1932) 216 Cal. 564; *Oasis West Realty v. Goldman* (2011) 51 Cal.4th 811.) The proposed rule affirms that duty. (See paragraph (c)(3) and Comment [1].)

There are a number of reasons for the Commission's recommendation. *First*, adopting the structure, format and language of the Model Rule, as supplemented by language and law developed in California case law and statutes, should protect client interests by better demarcating the ways in which the lawyer might acquire confidential client information "material to the matter," (paragraphs (a) and (b)), and delimit the lawyer's precise duties in protecting that information once acquired, (paragraph (c)). *Second*, incorporating the concept of matters that are "substantially related" into the blackletter of the rule reflects how current rule 3-310(E) has been interpreted and applied in both civil (*H.F. Ahmanson & Co. v. Salomon Brothers, Inc.* (1991) 229 Cal.App.3d 1445) and disciplinary contexts (*In re Matter of Lane* (1994) 2 Cal. State Bar Ct. Rptr. 735).)

**Informed written consent.** In addition to the foregoing considerations, the Commission recommends carrying forward California's more client-protective requirement that a lawyer obtain the client's "informed written consent," which requires written disclosure of the potential adverse consequences of the client consenting to a conflicted representation. The Model Rules, on the other hand, employ a less-strict requirement of requiring only "informed consent, confirmed in writing." That standard permits a lawyer to confirm by email or even text message that the client has consented to a conflict.

Paragraph (a) of proposed Rule 1.9 recognizes that a lawyer who has participated in the same or a substantially related matter in which the lawyer's new client has interests adverse to the former client, the lawyer will have acquired confidential information material to the new matter and will be prohibited from representing the new client unless the former client gives informed written consent.

Paragraph (b) incorporates Model Rule 1.9(b), which was adopted as the law of California by the court in *Adams v. Aerojet-General Corp.* (2001) 86 Cal.App.4<sup>th</sup> 1324. In effect, Rule 1.9(b) will codify the *Adams v. Aerojet* case. The concept recognized by *Adams* and MR 1.9(b) is that a lawyer in a law firm may become privy to the confidential information of a firm client even if the lawyer did not personally represent the client in the same or a substantially related matter. This is sometimes referred to as the "water cooler" phenomenon, the lawyer having acquired the information by consulting with another firm lawyer who actually worked on the case. Incorporating this concept into a rule of professional conduct would afford greater client protection regarding adverse use of confidential information by alerting lawyers to how confidential information might be acquired even without having actually represented a client.

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The Commission is also recommending rule counterparts to those rules, each of which is the subject of a separate memorandum.

Paragraph (c) has three subparagraphs. Subparagraph (c)(1) prohibits a lawyer from “using” a former client’s information to the client’s disadvantage except as permitted under the Rules or the State Bar Act, or if the information has become generally known. This is the former client counterpart to proposed Rule 1.8.2, which prohibits a lawyer from “using” a current client’s confidential information to the client’s disadvantage. Subparagraph (c)(2) prohibits a lawyer from “revealing” a former client’s confidential information except to the extent such disclosure is permitted by the Rules or the State Bar Act. Subparagraph (c)(3) has no counterpart in Model Rule 1.9. It carries forward current rule 3-310(E), modified to conform to the Commission’s format and style requirements. The intent of including this subparagraph is to ensure that the concept of residual loyalty recognized in the *Wutchumna* and *Oasis West* cases cited above is incorporated into the Rule. This provision is somewhat controversial as a minority of the Commission takes the position that the concept addressed in subparagraph (c)(3) is already adequately addressed in paragraph (a) and subparagraphs (c)(1) and (c)(2), and the inclusion of (c)(3) might cause confusion without adding any public protection.

There are four comments to proposed Rule 1.9, all of which provide interpretative guidance or clarify how the proposed rule, which is intended to govern a broad array of complex conflicts situations, should be applied. Comment [1] clarifies that there is a residual duty of loyalty owed former clients so that a lawyer is prohibited from attacking the very legal services that the lawyer has provided the former client, and provides two examples of prohibited representations. Comment [2] explains how paragraph (b), which codifies *Adams v. Aerojet-General*, should be applied, and provides additional clarification on how the rule should be applied when a lawyer moves laterally from one firm to another. Comment [3] draws an important distinction between information that is in the public record (e.g., a former client’s criminal record) and information that is “generally known,” and cites to *In the Matter of Johnson*, a Review Department case that imposed discipline on a lawyer for revealing public record information of a former client’s criminal history. Comment [4] provides cross-references to related rules that govern other situations involving former clients, for example, when the former client is a governmental agency.

### **Post Public Comment Revisions**

After consideration of public comment, the Commission deleted paragraph (c)(3) and added a new comment addressing when two matters are “the same or substantially related.” The Commission believes that the concept contained in (c)(3) is adequately addressed in paragraphs (a) and (b), coupled with the prohibitions on use and disclosure of confidential information as contained in (c)(1) and (c)(2).

### **Proposed Rule as Amended by the Board of Trustees on November 17, 2016**

After making revisions in response to public comment, the Commission submitted its proposed rule to the Board of Trustees for consideration at the Board’s meeting on November 17, 2016. The Board revised the rule to address two potential ambiguities.

First, in Comment [4], the Board revised the third and fourth sentences to add the phrase “lawyers in” before the references to a law firm. This was done to make clear that it is the lawyers in a firm and not a firm itself as an entity that are subject to the rule.

Second, in Comment [6], the Board revised the second sentence to delete a reference to the “disqualification of a firm” and substitute the phrase “imputation of conflicts to lawyers in a firm.”

This was done to clarify that the attorney conduct standards set by the rules are not intended to be standards of law firm disqualification in non-disciplinary proceedings.

With these changes, the Board voted to authorize an additional 45-day public comment period on the proposed rule.

The redline strikeout text below shows the changes made by the Board:

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[4] Paragraph (b) addresses a lawyer's duties to a client who has become a former client because the lawyer no longer is associated with the law firm\* that represents or represented the client. In that situation, the lawyer has a conflict of interest only when the lawyer involved has actual knowledge of information protected by Business and Professions Code § 6068(e) and Rules 1.6 and 1.9(c). Thus, if a lawyer while with one firm\* acquired no knowledge or information relating to a particular client of the firm,\* and that lawyer later joined another firm,\* neither the lawyer individually nor lawyers in the second firm\* would violate this Rule by representing another client in the same or a related matter even though the interests of the two clients conflict. See Rule 1.10(b) for the restrictions on lawyers in a firm\* once a lawyer has terminated association with the firm.\*

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[6] With regard to the effectiveness of an advance consent, see Rule 1.7, Comment [10]. With regard to imputation of conflicts to lawyers in ~~disqualification of~~ a firm\* with which a lawyer is or was formerly associated, see Rule 1.10. Current and former government lawyers must comply with this Rule to the extent required by Rule 1.11.

**Rule 1.9 [3-310(E)] Duties To Former Clients**  
**(Commission's Proposed Rule Adopted on October 21–22, 2016**  
**as Amended by the Board on November 17, 2016 – Clean Version)**

- (a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person\* in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed written consent.\*
- (b) A lawyer shall not knowingly\* represent a person\* in the same or a substantially related matter in which a firm\* with which the lawyer formerly was associated had previously represented a client
  - (1) whose interests are materially adverse to that person; and
  - (2) about whom the lawyer had acquired information protected by Business and Professions Code § 6068(e) and Rules 1.6 and 1.9(c) that is material to the matter;unless the former client gives informed written consent.\*
- (c) A lawyer who has formerly represented a client in a matter or whose present or former firm\* has formerly represented a client in a matter shall not thereafter:
  - (1) use information protected by Business and Professions Code § 6068(e) and Rule 1.6 acquired by virtue of the representation of the former client to the disadvantage of the former client except as these Rules or the State Bar Act would permit with respect to a current client, or when the information has become generally known;\*
  - (2) reveal information protected by Business and Professions Code § 6068(e) and Rule 1.6 acquired by virtue of the representation of the former client except as these Rules or the State Bar Act permit with respect to a current client.

**Comment**

[1] After termination of a lawyer-client relationship, the lawyer owes two duties to a former client. The lawyer may not (i) do anything that will injuriously affect the former client in any matter in which the lawyer represented the former client, or (ii) at any time use against the former client knowledge or information acquired by virtue of the previous relationship. See *Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811 [124 Cal.Rptr.3d 256] and *Wutchumna Water Co. v. Bailey* (1932) 216 Cal. 564 [15 P.2d 505]. For example, (i) a lawyer could not properly seek to rescind on behalf of a new client a contract drafted on behalf of the former client and (ii) a lawyer who has prosecuted an accused person\* could not represent the accused in a subsequent civil action against the government concerning the same matter. See also Business and Professions Code § 6131 and 18 U.S.C. § 207(a). These duties exist to preserve a client's trust in the lawyer and to encourage the client's candor in communications with the lawyer.

[2] For what constitutes a "matter" for purposes of this Rule, see Rule 1.7, Comment [2].

[3] Two matters are “the same or substantially related” for purposes of this Rule if they involve a substantial\* risk of a violation of one of the two duties to a former client described above in Comment [1]. This will occur: (i) if the matters involve the same transaction or legal dispute or other work performed by the lawyer for the former client; or (ii) if the lawyer normally would have obtained information in the prior representation that is protected by Business and Professions Code § 6068(e) and Rule 1.6, and the lawyer would be expected to use or disclose that information in the subsequent representation because it is material to the subsequent representation.

[4] Paragraph (b) addresses a lawyer’s duties to a client who has become a former client because the lawyer no longer is associated with the law firm\* that represents or represented the client. In that situation, the lawyer has a conflict of interest only when the lawyer involved has actual knowledge of information protected by Business and Professions Code § 6068(e) and Rules 1.6 and 1.9(c). Thus, if a lawyer while with one firm\* acquired no knowledge or information relating to a particular client of the firm,\* and that lawyer later joined another firm,\* neither the lawyer individually nor lawyers in the second firm\* would violate this Rule by representing another client in the same or a related matter even though the interests of the two clients conflict. See Rule 1.10(b) for the restrictions on lawyers in a firm\* once a lawyer has terminated association with the firm.\*

[5] The fact that information can be discovered in a public record does not, by itself, render that information generally known\* under paragraph (c). See, e.g., *In the Matter of Johnson* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179.

[6] With regard to the effectiveness of an advance consent, see Rule 1.7, Comment [10]. With regard to imputation of conflicts to lawyers in a firm\* with which a lawyer is or was formerly associated, see Rule 1.10. Current and former government lawyers must comply with this Rule to the extent required by Rule 1.11.



**Rule 1.9 [3-310(E)] Duties To Former Clients**  
**(Commission's Proposed Rule Adopted on October 21–22, 2016 as Amended by**  
**the Board on November 17, 2016 – Redline to Public Comment Draft Version)**

- (a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person\* in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed written consent.\*
- (b) A lawyer shall not knowingly\* represent a person\* in the same or a substantially related matter in which a firm\* with which the lawyer formerly was associated had previously represented a client
  - (1) whose interests are materially adverse to that person; and
  - (2) about whom the lawyer had acquired information protected by Business and Professions Code § 6068(e) and Rules 1.6 and 1.9(c) that is material to the matter;unless the former client gives informed written consent.\*
- (c) A lawyer who has formerly represented a client in a matter or whose present or former firm\* has formerly represented a client in a matter shall not thereafter:
  - (1) use information protected by Business and Professions Code § 6068(e) and Rule 1.6 acquired by virtue of the representation of the former client to the disadvantage of the former client except as these Rules or the State Bar Act would permit with respect to a current client, or when the information has become generally known;\*
  - (2) reveal information protected by Business and Professions Code § 6068(e) and Rule 1.6 acquired by virtue of the representation of the former client except as these Rules or the State Bar Act permit with respect to a current client;~~or~~
  - ~~(3) without the informed written consent\* of the former client, accept representation adverse to the former client where, by virtue of the representation of the former client, the lawyer has acquired information protected by Business and Professions Code § 6068(e) and Rule 1.6 that is material to the representation.~~

**Comment**

[1] After termination of a lawyer-client relationship, the lawyer owes two duties to a former client. The lawyer may not (i) do anything that will injuriously affect the former client in any matter in which the lawyer represented the former client, or (ii) at any time use against the former client knowledge or information acquired by virtue of the previous relationship. See *Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811

[124 Cal.Rptr.3d 256] and *Wutchumna Water Co. v. Bailey* (1932) 216 Cal. 564 [15 P.2d 505]. For example, (i) a lawyer could not properly seek to rescind on behalf of a new client a contract drafted on behalf of the former client and (ii) a lawyer who has prosecuted an accused person\* could not represent the accused in a subsequent civil action against the government concerning the same matter. See also Business and Professions Code § 6131 and 18 U.S.C. § 207(a). These duties exist to preserve a client's trust in the lawyer and to encourage the client's candor in communications with the lawyer.

[2] [For what constitutes a “matter” for purposes of this Rule, see Rule 1.7, Comment \[2\].](#)

[3] [Two matters are “the same or substantially related” for purposes of this Rule if they involve a substantial\\* risk of a violation of one of the two duties to a former client described above in Comment \[1\]. This will occur: \(i\) if the matters involve the same transaction or legal dispute or other work performed by the lawyer for the former client; or \(ii\) if the lawyer normally would have obtained information in the prior representation that is protected by Business and Professions Code § 6068\(e\) and Rule 1.6, and the lawyer would be expected to use or disclose that information in the subsequent representation because it is material to the subsequent representation.](#)

[4] Paragraph (b) addresses a lawyer's duties to a client who has become a former client because the lawyer no longer is associated with the law firm\* that represents or represented the client. In that situation, the lawyer has a conflict of interest only when the lawyer involved has actual knowledge of information protected by ~~Rules 1.6, 1.9(c), and~~ Business and Professions Code § 6068(e) [and Rules 1.6 and 1.9\(c\)](#). Thus, if a lawyer while with one firm\* acquired no knowledge or information relating to a particular client of the firm,\* and that lawyer later joined another firm,\* neither the lawyer individually nor [lawyers in](#) the second firm\* would violate this Rule by representing another client in the same or a related matter even though the interests of the two clients conflict. See Rule 1.10(b) for the restrictions on [lawyers in](#) a firm\* once a lawyer has terminated association with the firm.\*

[35] The fact that information can be discovered in a public record does not, by itself, render that information generally known\* under paragraph (c). See, e.g., *In the Matter of Johnson* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179.

[46] With regard to the effectiveness of an advance consent, see [Rule 1.7, Comment \[810\]](#) ~~to Rule 1.7~~. With regard to [imputation of conflicts to lawyers in](#) ~~disqualification of~~ a firm\* with which a lawyer is or was formerly associated, see Rule 1.10. Current and former government lawyers must comply with this Rule to the extent required by Rule 1.11.

Rule 1.9 [3-310(E)] ~~Avoiding the Representation of Adverse Interests~~ Duties To Former Clients

(Redline Comparison of the Proposed Rule to Current California Rule)

- (~~E~~a) A ~~member shall not, without the~~ lawyer who has formerly represented a client in a matter shall not thereafter represent another person\* in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed written consent ~~of the client or former client, accept employment adverse to the client or former client where, by reason of the representation of the client or former client, the member has obtained confidential information material to the employment.\*~~
- (b) A lawyer shall not knowingly\* represent a person\* in the same or a substantially related matter in which a firm\* with which the lawyer formerly was associated had previously represented a client
- (1) whose interests are materially adverse to that person; and
- (2) about whom the lawyer had acquired information protected by Business and Professions Code § 6068(e) and Rules 1.6 and 1.9(c) that is material to the matter;
- unless the former client gives informed written consent.\*
- (c) A lawyer who has formerly represented a client in a matter or whose present or former firm\* has formerly represented a client in a matter shall not thereafter:
- (1) use information protected by Business and Professions Code § 6068(e) and Rule 1.6 acquired by virtue of the representation of the former client to the disadvantage of the former client except as these Rules or the State Bar Act would permit with respect to a current client, or when the information has become generally known;\*
- (2) reveal information protected by Business and Professions Code § 6068(e) and Rule 1.6 acquired by virtue of the representation of the former client except as these Rules or the State Bar Act permit with respect to a current client.

~~Discussion~~ Comment

[1] After termination of a lawyer-client relationship, the lawyer owes two duties to a former client. The lawyer may not (i) do anything that will injuriously affect the former client in any matter in which the lawyer represented the former client, or (ii) at any time use against the former client knowledge or information acquired by virtue of the previous relationship. See *Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811 [124 Cal.Rptr.3d 256] and *Wutchumna Water Co. v. Bailey* (1932) 216 Cal. 564 [15 P.2d 505]. For example, (i) a lawyer could not properly seek to rescind on behalf of a

new client a contract drafted on behalf of the former client and (ii) a lawyer who has prosecuted an accused person\* could not represent the accused in a subsequent civil action against the government concerning the same matter. See also Business and Professions Code § 6131 and 18 U.S.C. § 207(a). These duties exist to preserve a client's trust in the lawyer and to encourage the client's candor in communications with the lawyer.

[2] For what constitutes a "matter" for purposes of this Rule, see Rule 1.7, Comment [2].

[3] Two matters are "the same or substantially related" for purposes of this Rule if they involve a substantial\* risk of a violation of one of the two duties to a former client described above in Comment [1]. This will occur: (i) if the matters involve the same transaction or legal dispute or other work performed by the lawyer for the former client; or (ii) if the lawyer normally would have obtained information in the prior representation that is protected by Business and Professions Code § 6068(e) and Rule 1.6, and the lawyer would be expected to use or disclose that information in the subsequent representation because it is material to the subsequent representation.

[4] Paragraph (b) addresses a lawyer's duties to a client who has become a former client because the lawyer no longer is associated with the law firm\* that represents or represented the client. In that situation, the lawyer has a conflict of interest only when the lawyer involved has actual knowledge of information protected by Business and Professions Code § 6068(e) and Rules 1.6 and 1.9(c). Thus, if a lawyer while with one firm\* acquired no knowledge or information relating to a particular client of the firm,\* and that lawyer later joined another firm,\* neither the lawyer individually nor lawyers in the second firm\* would violate this Rule by representing another client in the same or a related matter even though the interests of the two clients conflict. See Rule 1.10(b) for the restrictions on lawyers in a firm\* once a lawyer has terminated association with the firm.\*

[5] The fact that information can be discovered in a public record does not, by itself, render that information generally known\* under paragraph (c). See, e.g., *In the Matter of Johnson* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179.

[6] With regard to the effectiveness of an advance consent, see Rule 1.7, Comment [10]. With regard to imputation of conflicts to lawyers in a firm\* with which a lawyer is or was formerly associated, see Rule 1.10. Current and former government lawyers must comply with this Rule to the extent required by Rule 1.11.

~~Paragraph (B) is not intended to require either the disclosure of the new engagement to a former client or the consent of the former client to the new engagement. However, both disclosure and consent are required if paragraph (E) applies.~~

~~While paragraph (B) deals with the issues of adequate disclosure to the present client or clients of the member's present or past relationships to other parties or witnesses or present interest in the subject matter of the representation, paragraph (E) is intended to~~

~~protect the confidences of another present or former client. These two paragraphs are to apply as complementary provisions.~~



**Rule 1.9 [3-310(E)] Duties ~~to~~To Former Clients**  
**(Redline Comparison of the Proposed Rule to ABA Model Rule)**

- (a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person\* in the same or a substantially related matter in which that ~~person's~~person's interests are materially adverse to the interests of the former client unless the former client gives informed written consent, ~~confirmed in writing.~~\*
- (b) A lawyer shall not knowingly\* represent a person\* in the same or a substantially related matter in which a firm\* with which the lawyer formerly was associated had previously represented a client
- (1) whose interests are materially adverse to that person; and
  - (2) about whom the lawyer had acquired information protected by Business and Professions Code § 6068(e) and Rules 1.6 and 1.9(c) that is material to the matter;
- unless the former client gives informed written consent, ~~confirmed in writing.~~\*
- (c) A lawyer who has formerly represented a client in a matter or whose present or former firm\* has formerly represented a client in a matter shall not thereafter:
- (1) use information ~~relating to~~protected by Business and Professions Code § 6068(e) and Rule 1.6 acquired by virtue of the representation of the former client to the disadvantage of the former client except as these Rules or the State Bar Act would permit ~~or require~~ with respect to a current client, or when the information has become generally known; ~~or~~\*
  - (2) reveal information ~~relating to~~protected by Business and Professions Code § 6068(e) and Rule 1.6 acquired by virtue of the representation of the former client except as these Rules ~~would~~or the State Bar Act permit ~~or require~~ with respect to a current client.

**Comment**

[1] After termination of a ~~client-lawyer~~lawyer-client relationship, ~~a~~the lawyer ~~has certain continuing duties with respect to confidentiality and conflicts of interest and thus may not represent another client except in conformity with this Rule. Under this Rule, for~~owes two duties to a former client. The lawyer may not (i) do anything that will injuriously affect the former client in any matter in which the lawyer represented the former client, or (ii) at any time use against the former client knowledge or information acquired by virtue of the previous relationship. See *Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811 [124 Cal.Rptr.3d 256] and *Wutchumna Water Co. v. Bailey* (1932) 216 Cal. 564 [15 P.2d 505]. For example, (i) a lawyer could not properly seek to rescind on behalf of a new client a contract drafted on behalf of the former client. ~~So~~ also and (ii) a lawyer who has prosecuted an accused person\* could not ~~properly~~

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represent the accused in a subsequent civil action against the government concerning the same ~~transaction. Nor could a lawyer who has represented multiple clients in a matter represent one of the clients against the others in the same or a substantially related matter after a dispute arose among the clients in that matter, unless all affected clients give informed consent. See Comment [9]. Current and former government lawyers must comply with this Rule to the extent required by Rule 1.11.~~matter. See also Business and Professions Code § 6131 and 18 U.S.C. § 207(a). These duties exist to preserve a client's trust in the lawyer and to encourage the client's candor in communications with the lawyer.

[2] For what constitutes a "matter" for purposes of this Rule, see Rule 1.7, Comment [2].

~~[2] The scope of a "matter" for purposes of this Rule depends on the facts of a particular situation or transaction. The lawyer's involvement in a matter can also be a question of degree. When a lawyer has been directly involved in a specific transaction, subsequent representation of other clients with materially adverse interests in that transaction clearly is prohibited. On the other hand, a lawyer who recurrently handled a type of problem for a former client is not precluded from later representing another client in a factually distinct problem of that type even though the subsequent representation involves a position adverse to the prior client. Similar considerations can apply to the reassignment of military lawyers between defense and prosecution functions within the same military jurisdictions. The underlying question is whether the lawyer was so involved in the matter that the subsequent representation can be justly regarded as a changing of sides in the matter in question.~~

[3] Two matters are "the same or substantially related" for purposes of this Rule if they involve a substantial\* risk of a violation of one of the two duties to a former client described above in Comment [1]. This will occur: (i) if the matters involve the same transaction or legal dispute or other work performed by the lawyer for the former client; or (ii) if the lawyer normally would have obtained information in the prior representation that is protected by Business and Professions Code § 6068(e) and Rule 1.6, and the lawyer would be expected to use or disclose that information in the subsequent representation because it is material to the subsequent representation.

~~[3] Matters are "substantially related" for purposes of this Rule if they involve the same transaction or legal dispute or if there otherwise is a substantial risk that confidential factual information as would normally have been obtained in the prior representation would materially advance the client's position in the subsequent matter. For example, a lawyer who has represented a businessperson and learned extensive private financial information about that person may not then represent that person's spouse in seeking a divorce. Similarly, a lawyer who has previously represented a client in securing environmental permits to build a shopping center would be precluded from representing neighbors seeking to oppose rezoning of the property on the basis of environmental considerations; however, the lawyer would not be precluded, on the grounds of substantial relationship, from defending a tenant of the completed shopping center in resisting eviction for nonpayment of rent. Information that has been disclosed~~



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~~to the public or to other parties adverse to the former client ordinarily will not be disqualifying. Information acquired in a prior representation may have been rendered obsolete by the passage of time, a circumstance that may be relevant in determining whether two representations are substantially related. In the case of an organizational client, general knowledge of the client's policies and practices ordinarily will not preclude a subsequent representation; on the other hand, knowledge of specific facts gained in a prior representation that are relevant to the matter in question ordinarily will preclude such a representation. A former client is not required to reveal the confidential information learned by the lawyer in order to establish a substantial risk that the lawyer has confidential information to use in the subsequent matter. A conclusion about the possession of such information may be based on the nature of the services the lawyer provided the former client and information that would in ordinary practice be learned by a lawyer providing such services.~~

### *Lawyers Moving Between Firms*

~~[4] When lawyers have been associated within a firm but then end their association, the question of whether a lawyer should undertake representation is more complicated. There are several competing considerations. First, the client previously represented by the former firm must be reasonably assured that the principle of loyalty to the client is not compromised. Second, the rule should not be so broadly cast as to preclude other persons from having reasonable choice of legal counsel. Third, the rule should not unreasonably hamper lawyers from forming new associations and taking on new clients after having left a previous association. In this connection, it should be recognized that today many lawyers practice in firms, that many lawyers to some degree limit their practice to one field or another, and that many move from one association to another several times in their careers. If the concept of imputation were applied with unqualified rigor, the result would be radical curtailment of the opportunity of lawyers to move from one practice setting to another and of the opportunity of clients to change counsel.~~

[54] Paragraph (b) ~~operates to disqualify the lawyer~~addresses a lawyer's duties to a client who has become a former client because the lawyer no longer is associated with the law firm\* that represents or represented the client. In that situation, the lawyer has a conflict of interest only when the lawyer involved has actual knowledge of information protected by Business and Professions Code § 6068(e) and Rules 1.6 and 1.9(c). Thus, if a lawyer while with one firm\* acquired no knowledge or information relating to a particular client of the firm,\* and that lawyer later joined another firm,\* neither the lawyer individually nor lawyers in the second firm ~~is disqualified from~~\* would violate this Rule by representing another client in the same or a related matter even though the interests of the two clients conflict. See Rule 1.10(b) for the restrictions on lawyers in a firm\* once a lawyer has terminated association with the firm.\*

[5] The fact that information can be discovered in a public record does not, by itself, render that information generally known\* under paragraph (c). See, e.g., *In the Matter of Johnson* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179.

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[6] With regard to the effectiveness of an advance consent, see Rule 1.7, Comment [10]. With regard to imputation of conflicts to lawyers in a firm\* with which a lawyer is or was formerly associated, see Rule 1.10. Current and former government lawyers must comply with this Rule to the extent required by Rule 1.11.

~~[6] Application of paragraph (b) depends on a situation's particular facts, aided by inferences, deductions or working presumptions that reasonably may be made about the way in which lawyers work together. A lawyer may have general access to files of all clients of a law firm and may regularly participate in discussions of their affairs; it should be inferred that such a lawyer in fact is privy to all information about all the firm's clients. In contrast, another lawyer may have access to the files of only a limited number of clients and participate in discussions of the affairs of no other clients; in the absence of information to the contrary, it should be inferred that such a lawyer in fact is privy to information about the clients actually served but not those of other clients. In such an inquiry, the burden of proof should rest upon the firm whose disqualification is sought.~~

~~[7] Independent of the question of disqualification of a firm, a lawyer changing professional association has a continuing duty to preserve confidentiality of information about a client formerly represented. See Rules 1.6 and 1.9(c).~~

~~[8] Paragraph (c) provides that information acquired by the lawyer in the course of representing a client may not subsequently be used or revealed by the lawyer to the disadvantage of the client. However, the fact that a lawyer has once served a client does not preclude the lawyer from using generally known information about that client when later representing another client.~~

~~[9] The provisions of this Rule are for the protection of former clients and can be waived if the client gives informed consent, which consent must be confirmed in writing under paragraphs (a) and (b). See Rule 1.0(e). With regard to the effectiveness of an advance waiver, see Comment [22] to Rule 1.7. With regard to disqualification of a firm with which a lawyer is or was formerly associated, see Rule 1.10.~~

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**Synopsis of Public Comments**

**TOTAL = 12**      **A = 1**  
**D = 0**  
**M = 11**  
**NI = 0**

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI <sup>1</sup>	Rule Section or Cmt.	Comment	RRC Response
2016-32o	Law Professors (Zitrin) (07-25-16)	Yes	M	(c)(1)	In MR 1.9 (c)(1) an exception to the use of confidential information by a former lawyer when the information is “generally known.” Although this tracks the ABA rule, the word “generally” is not otherwise defined. In order to truly secure client confidence and secrets, we recommend the rule state the exception as information that is “generally <u>and widely</u> known.”	The commenters’ requested revision was not implemented because the Commission believes that “generally known” has the same meaning as “generally and widely known.”
X-2016-43r	Committee on Professional Responsibility and Conduct (COPRAC) (Baldwin)	Yes	M	(c)(3)	COPRAC supports the proposed rule, with the exception of proposed subparagraph (c)(3). COPRAC believes that subparagraph (c)(3) should be deleted for two reasons. First, the problem that paragraph (c) is intended to address is likely to arise very infrequently. The substantial relationship test contained in paragraphs (a) and (b) is a very broad prophylactic rule. Accordingly, it will be a rare case in which a lawyer is not disqualified by the substantial relationship but still has any material confidential information. Second, in those cases the Committee believes that the absolute prohibitions on use or disclosure in subparagraphs	In light of public comment, the Commission has modified the proposed Rule to delete proposed subparagraph (c)(3) and add a new comment addressing when two matters are “the same or substantially related.” With this modification, the Commission agrees that the prohibitions set out in paragraphs (a) and (b), the prohibitions on use and disclosure of confidential information, and the existing case law recognizing the client’s right to seek disqualification on the basis of proof that the lawyer has actually received confidential information material to the matter provide adequate client

<sup>1</sup> A = AGREE with proposed Rule      D = DISAGREE with proposed Rule      M = AGREE ONLY IF MODIFIED      NI = NOT INDICATED

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					(c)(1) and (c)(2), coupled with the client's recognized right to seek disqualification on the basis of proof that the lawyer has actually received confidential information material to the matter, provide adequate protection against harm to the former client. Accordingly, we respectfully suggest that the proposed rule be conformed to the approach of every other American jurisdiction by deleting subparagraph (c)(3).	protection against harm to the former client.
2016-520	Law Professors (Zitrin) (08-24-16)	Yes	M	(c)(1)	In MR 1.9 (c)(1) an exception to the use of confidential information by a former lawyer when the information is "generally known." Although this tracks the ABA rule, the word "generally" is not otherwise defined. In order to truly secure client confidence and secrets, we recommend the rule state the exception as information that is "generally <u>and widely</u> known."	The commenters' requested revision was not implemented because the Commission believes that "generally known" has the same meaning as "generally and widely known."
Public Hearing	Menaster, Albert (Provided oral public hearing testimony on July 26, 2016. See pages 29-34 of the public hearing transcript.)	No	M	(c)(3) Comment 1 (ii)	What the rule articulates is that "A former client with whom we've obtained confidential information, we cannot now represent a new client." The Office of the Public Defender (PD) has a written conflict policy which is used as a model for other PD offices around the state. Our written policy says that "if a former client is a prosecution witness or a victim	In light of public comment, the Commission has modified the proposed Rule to delete proposed subparagraph (c)(3) and add a new comment addressing when two matters are "the same or substantially related." The Commission notes that paragraph (c)(3) carried forward current rule 3-310(E) nearly verbatim. The

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					<p>and we are looking at whether to represent a current client, we are not permitted to use any of the information from the former client that will create a conflict, but mere possession does not create a conflict.” That’s the line that the office policy draws. There’s no ethical problem from having information that’s not being used. The problem is using it. The distinctions between possession and use acquired is the word that the draft Commission rules articulate.</p> <p>The significance of that point is there are a very large number of cases where former clients are prosecution witnesses. I suspect that if the rule is that possession is enough to disqualify us in cases, my office will never handle another gang case because somebody in the prosecution’s case is going to be a client of mine. The number of cases we would be required to conflict on would be substantially large. Many PD offices around the state are in precarious positions because their Board of Supervisors don’t like it. They consider the PD office liberal. These offices survive only because they’re so much</p>	<p>Commission also notes that proposed paragraphs (a) and (b) impose the same obligations on lawyers as does current rule 3-310(E). The Commission also notes that the commenter’s statement that “mere possession [of material confidential information] does not create a conflict” may be inconsistent with case law regarding disqualification. See, e.g., <i>Costello v. Buckley</i> (2016) 245 Cal.App.4th 748, 755 (in a case where a lawyer could have acquired confidential information from a former client that can be used to the former’s client’s disadvantage in a current case, the lawyer “is not only prevented from actually using the confidential information, but also is prevented from accepting subsequent employment representing an adverse party to the former client when he may be called upon to use such information.” [citing <i>Kraus v. Davis</i> (1970) 6 Cal.App.3d 494, 489, 85 Cal.Rptr. 846.) Thus, the possession by a lawyer of confidential information of a former client that is material in a current</p>

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					<p>cheaper than the private party. The more conflicts we have to declare, the worse acquisition becomes, and eventually we're going to hit a point where it's going to endanger the PD offices throughout the state.</p> <p>There is actually an inconsistency between the proposed rule and the comments. The rule says "acquiring information" but the comment says "use". We urge this Commission to adopt the comments which correctly cites the "<i>Wachumna</i>" case.</p> <p>One final collateral thought. What if we only represent a client at an arraignment where we ask questions regarding: true name, birthdate, family, work information and prior criminal history. All of these are clearly confidential. They have nothing to do with anything. Why would that be a conflict. Well, it's not, unless the rule is "acquiring information". We would be satisfied with the rule by the Commission adding the language from the comments which says the use of information precludes the representation of the client.</p>	<p>matter in which the lawyer represents a client with interests adverse to the former client prohibits the lawyer from accepting or continuing the current representation. Nevertheless, a court might conclude that a lawyer in the prohibited lawyer's firm can represent the client if the prohibited lawyer is timely and effectively screened. See, e.g., <i>In re Charlis C</i> (2008) 45 Cal.4th 145 [84 Cal.Rptr.3d 597].</p>

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Public Hearing	Alternate Public Defender for Los Angeles (Goodman, Michael) (Provided oral public hearing testimony on July 26, 2016. See pages 62-64 of the public hearing transcript.)	Yes		(a) (c)(3)	<p>The rule talks about representing people where you have an adverse relationship as a result of representing somebody else. The current rule talks about the subject matter of the former client's representation. The new rule should add that the adverse aspects of the relationship are adverse as it relates to prior representation of that client, not simply that it's adverse to the client. The difficulty is that we have an enumerable number of (often gang involvement) cases where as a result of our representation, clients/former clients don't like the fact that we represent those people. Representing a new person, can potentially put that person at risk, simply by virtue of our representation, which we think is something adverse to that client's interest but not adverse to the former client's interest in the particular matter in which we represented them --- which is what we think the language of new rule should include. We would like language in the new rule which limits the conflict of interest "the same matter that was the subject of the former representation,"</p>	<p>The Commission did not make the suggested change. To limit prohibitions to the "same matter" in which a lawyer represented the former client is at odds with well-settled law. See, e.g., <i>Jessen v. Hartford Casualty Ins. Co.</i> (2003) 111 Cal.App.4th 698, 3 Cal.Rptr.3d 877 (Applying substantial relationship test); <i>H.F. Ahmanson &amp; Co. v. Salomon Bros., Inc.</i> (1991) 229 Cal.App.3d 1445, 280 Cal.Rptr. 614 (same).</p>

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X-2016-66i	San Diego County Bar Association (SDCBA) (Riley)	Y	A		Supports the adoption of this proposed rule as a significant improvement over current Rule 3-310(E)—while maintaining client protections of the current rule—in that it incorporates the judicially developed “substantial relationship” test and addresses the increasing issue of potential conflicts arising from lawyers moving from one firm to another. We further believe the Comments provide valuable guidance to lawyers.	No response required.
X-2016-67d	Orange County Bar Association (OCBA) (Friedland)	Y	M	1.9(c)(1) Comment [3]	Believes that Proposed Rule 1.9 should not include the exception in subsection 1.9(c)(1) that allows lawyers to “use information... to the disadvantage of the former client... when the information has become generally known,” or the corresponding Comment [3]. The provisions in this Rule should be consistent with the provisions of Proposed Rule 1.6 regarding the confidentiality obligations of lawyers. The current version of Proposed Rule 1.6 does not include any exception for information that is “generally known,” so there should not be a backdoor exception to lawyers’ confidentiality obligations in this Rule 1.9. By way of this comment, the OCBA takes no	The Commission disagrees that paragraph (c)(1) would provide a “back door” exception to proposed Rule 1.6 [3-100]. The provision only permits the use of the former client’s confidential information that has become generally known; the lawyer is still absolutely prohibited from revealing a former client’s confidential information under paragraph (c)(2) and is absolutely prohibited from using confidential information to a <i>current</i> client’s disadvantage by proposed Rule 1.8.2. Thus, for example, a lawyer could use information of a <i>former</i> client that was confidential when learned but



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					position on whether the confidentiality provisions of Rule 1.6 should or should not include an exception for information that is "generally known."	is now generally known to make investment decisions. The lawyer could not do the same with information from a current client, or reveal that information.
X-2016-65a	Carroll, Dan	No	M	Comment [2]	<p>Opposes adoption of Proposed Rule 1.9 in its present form, but would support its adoption if inclusion of the concept of conflicts due to "substantially related matters" were removed.</p> <p>1. There is absolutely no discussion in either the proposed rule or the comments as to how a lawyer is to determine whether matters are "substantially related." The word "substantial" is defined in Proposed Rule 1.0.1(l), but not in a fashion that is helpful to this inquiry.</p> <p>2. The referenced lack of discussion includes absolutely no discussion as to whether the proposed rule is or is not intended to be evaluated under California case law concerning the "substantial relationship rule" as applied by courts in lawyer disqualification cases. Similarly, there is no discussion as to</p>	<p>The Commission has not made the suggested change. The inclusion of the term "substantially related" is necessary to capture those situations under which a lawyer might have obtained confidential information material to the present matter.</p> <p>1. The Commission has added a comment discussing when two matters are "the same or substantially related."</p> <p>2. See response to comment 1, above. Further, when courts apply the substantial relationship test in a disqualification motion, they nearly always use current rule 3-310(E) as a starting point. The Commission notes that paragraphs (a) and (b) impose the same obligations on</p>

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					<p>whether the proposed rule intends to create a new and different concept of "substantially related" to be applied for the purposes of lawyer discipline, These two issues are bound to lead to confusion in both lawyer analysis of the proposed rule as written and state bar disciplinary evaluation. Conflict of interest based on matters being "substantially related" should be left to be addressed by the courts in disqualification motions, not the disciplinary process. While I urge that the proposed rule be revised to remove all reference to "substantially related matters," if those references remain, I strongly urge the Committee include a specific comment clarifying whether lawyer disqualification "substantial relationship" case law should be consulted in analyzing conflicts under the proposed rule. I urge the Committee to state that lawyer-disqualification "substantial relationship" case law does not apply to analysis under this rule. The court-created "Substantial Relationship Test" was not adopted for the purpose of attorney discipline.</p> <p>3. Finally, notes Comment [2] to</p>	<p>lawyers as does current rule 3-310(E).</p> <p>3. The Commission disagrees</p>

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					the proposed rule is inconsistent with the proposed rule's content. Proposed Rule 1.9(b) forbids knowing representation of a person "in the same or a substantially related matter" in which a lawyer's former firm represented a client. Comment [2], however, inconsistently declares "the lawyer has a conflict of interest only when the lawyer involved has actual knowledge of information protected by" lawyer-client confidentiality. That is not what Proposed Rule 1.9(b) states. Rather, the proposed rule states it is a conflict of interest for the lawyer to knowingly represent a client as described in the proposed rule even in the absence of actual knowledge if the matters are "substantially related."	with the commenter's assertion that paragraph (b) "states it is a conflict of interest for the lawyer to knowingly represent a client as described in the proposed rule even in the absence of actual knowledge if the matters are 'substantially related.'" Subparagraphs (b)(1) and (b)(2) must both be satisfied for paragraph (b) to apply. Under subparagraph (b)(2), it must be shown that "the lawyer <i>had acquired information</i> [about the former client] protected by Business and Professions Code § 6068(e) and Rules 1.6 and 1.9(c) that is material to the matter." (Emphasis added.)
X-2016-86a	United States Department of Justice (US DOJ) (Ludwig)	Yes	M		<p>1. Supports the adoption of proposed Rule 1.9.</p> <p>2. However, as drafted, proposed Rule 1.9 provides lawyers with no guidance regarding two of the Rule's key concepts: (1) what constitutes a "matter" and (2) when matters are substantially related." We think that it is important to define these terms and recommend doing so</p>	<p>1. No response required.</p> <p>2. In response to public comment, the Commission has added comments discussing what constitutes a "matter" and when two matters are "the same or substantially related." The Commission is not adding a comment to provide guidance on matters such as</p>

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					<p>in the proposed Rule or its commentary using language consistent with that found in Comments [2] and [3] to Rule 1.9 of the American Bar Association's Model Rules of Professional Conduct . We also think that it would be helpful for the Commission to explain how a lawyer, without personally representing a client, may have "acquired information protected by B&amp;P Code § 6068(e) and Rules 1.6 and 1.9(c)" about that client that generally would disqualify the lawyer from "knowingly represent[ing] a person in the same or a substantially related matter" under proposed Rule 1.9(b). Although proposed Comment [2] makes clear that, under proposed Rule 1.9(b), "[a] lawyer has a conflict of interest only when the lawyer involved has actual knowledge of information protected by Rules 1.6, 1.9(c), and B&amp;P Code § 6068(e)," we do not think that it sufficiently alerts lawyers to the circumstances in which they might obtain actual knowledge of such information outside of a direct attorney-client relationship—e.g., the "water cooler" phenomenon" To provide such guidance and maximize the</p>	<p>the "water cooler effect" because it believes such a comment would be practice guidance inconsistent with the Commission's Charter.</p>

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					protection of former clients, we recommend that the Commission incorporate the language of Comment [6] to Model Rule 1.9 into the proposed Rule's commentary.	
X-2016-87b	Attorneys Liability Assurance Society (ALAS) (Garland)	Yes	M		Paragraphs (a) and (b) of Proposed Rule 1.9 are the same as ABA Model Rule 1.9 except that they incorporate California's more client-protective requirement for obtaining a client's "informed written consent" and refer to B&P § 6068(e). Due to their similarity to the ABA Rule, adopting paragraphs (a) and (b) of Proposed Rule 1.9 will facilitate compliance and enforcement by promoting a national standard.	No response required.
X-2016-104x	Office of Chief Trial Counsel (OCTC) (Dresser)	Yes	M		<p>1. OCTC generally supports this rule.</p> <p>2. It is concerned, however, about the use of the term "knowingly" in subsection (b). By using the term "knowingly" in this subsection the Commission is excluding attorneys who commit a violation by recklessness, gross negligence, or willful blindness. For example, this rule appears to exclude an attorney who either does not have a program to check conflicts or does not</p>	<p>1. No response required.</p> <p>2-3. The Commission has not made a change to the Rule. As it has noted with respect to other rules, the definition of "knowingly" in Rule 1.0.1(f) makes clear that knowledge can be inferred from the circumstances. A lawyer may not engage in willful blindness to avoid knowledge of a conflict situation.</p>

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					<p>actually check whether there is a conflict. That attorney can claim he or she does not have actual knowledge of the conflict. Thus, that attorney would not violate this rule, even though the attorney has engaged in willful blindness or gross negligence. Although negligence is not a basis for discipline, gross negligence, recklessness, and willful blindness ...warrants disciplinary action, since it is a violation of his oath to discharge his duties to the best of his knowledge and ability. Requiring actual knowledge in this rule will lessen the current standards governing attorney conduct and is contrary to well established standards for when attorney conduct is disciplinable.</p> <p>OCTC recognizes that conflict procedures may be more difficult when they involve clients from a former law firm, but that should be taken into account in determining if the conflict is the result of excusable negligence or gross negligence, recklessness, or willful blindness.</p> <p>3. OCTC is concerned with subparagraphs (a) and (b) of proposed Rule 1.9 because the</p>	<p>3. The commenter does not explain whether it believes the use of term “materially</p>

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					<p>Commission has added the requirement that the matter be materially adverse while the current rule only requires that it be adverse. This would appear to be a significant change in the rule and law. Moreover, while the term “materially adverse” is in the ABA Model Rules, neither the subparagraph nor proposed rule clarifies what that means and why the lawyer, not the client, should decide whether it is material. Further, it creates uncertainty for lawyers and makes it more difficult to prosecute a violation.</p> <p>4. OCTC supports the Commission’s inclusion of Business &amp; Professions Code section 6068(e) in subparagraph (b)(2).</p> <p>5. OCTC has concerns about Comments 1 and 2. They do not elucidate the rule but, instead, give a philosophical basis for the rule.</p> <p>6. OCTC supports Comment 3.</p> <p>7. OCTC has no position on</p>	<p>adverse” would result in a difference in how the current rule is applied. The Commission believes that absent evidence that the rule is different from the current standard, Rule 1.9 should move toward the national standard of “materially adverse.”</p> <p>4. No response required.</p> <p>5. The Commission has not made the suggested change. It believes that both comments, by providing an explanation of the duties and policy rationale underlying the rule, afford important interpretative guidance in applying the rule.</p> <p>6. No response required.</p> <p>7. No response required.</p>

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					Comment 4's discussion of advanced waivers.	
X-2016-93e	Los Angeles County Public Defender (Brown)	Yes	M		The text of Proposed Rule 1.9(c)(3) and the Comment to that Rule are inconsistent. The text of the Rule bars representation where the lawyer "acquires" information, but the Comment only bars representation where the lawyer "uses" previously acquired information. We contend that the Comment correctly states the rule.	In light of public comment, the Commission has modified the proposed Rule to delete proposed subparagraph (c)(3) and add a new comment addressing when two matters are "the same or substantially related." The Commission notes, however, that it disagrees with the commenter's assertion that the former proposed subparagraph (c)(3) and the Comment were inconsistent. The comment does not state that a lawyer is prohibited from representation only where the lawyer "uses" protected information.
X-2016-115c	Lamport, Stanley	No	M		1. Proposed Rule 1.9(a) and (c)(3) have overlapping and potentially conflicting standards that will not be understood by the average practitioner and are unlikely to be applied consistently by the courts.  Clients pay for this rule in the sense that the subject matter of this rule is frequently litigated in disqualification motions and	1. The Commission agrees and has deleted paragraph (c)(3) while adding a comment discussing when two matters are "the same or substantially related" for purposes of paragraph (a).



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					breach of duty cases.	
					<p>2. Changing the standards will inevitably result in the courts having to reconsider settled principles under the current rule. The current rule is not broken. There is no need to create a new rule with a hodgepodge of different standards with overlapping application that produces unnecessary litigation at the inevitable cost to clients.</p>	<p>2. The Commission disagrees that “changing the standards will <i>inevitably</i> result” in settled principles being reconsidered by the courts. (Emphasis added). Paragraphs (a) and (b) will accomplish the same result but provide clearer guidance on when a conflict situation will arise, thus enhancing compliance with the rule. Further, substituting paragraphs (a) and (b) will remove an unnecessary difference between California and a preponderance of the jurisdictions, consistent with the Commission’s Charter.</p>
					<p>3. <i>Suggested Revision Replaces Proposed Paragraph (a) With Paragraph (c)(3)</i></p> <p>Paragraph (c)(3) in the Proposed Rule is based on current rule 3-310(E) [which] eloquently and correctly states the duty.</p> <p>In practical terms, the current rule</p>	<p>3. The Commission has not made the suggested change. It believes that the standards set out in paragraphs (a) and (b), coupled with the new comment discussing when two matters are “the same or substantially related,” provide a clearer explanation of determining when a conflict with a former</p>

**Proposed Rule 1.9 [3-310(E)] Duties to Former Clients**  
**Synopsis of Public Comments**

**TOTAL = 12**      **A = 1**  
**D = 0**  
**M = 11**  
**NI = 0**

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI <sup>1</sup>	Rule Section or Cmt.	Comment	RRC Response
					<p>means that a lawyer cannot accept a representation in circumstances where the lawyer could potentially use or disclose the former client's confidential information in a manner that would be contrary to the former client's interests. Proposed paragraph (a) ties adversity to the interests of the lawyer's current client. The rule should be instructing the profession to view protection of a former client's interests in confidentiality from the former client's perspective and not from the perspective of the lawyer's new client. There is no reason to have two rules (paragraphs (a) and (c)(3) in the Proposed Rule) that cover the same subject, particularly when one of those rules (proposed paragraph (a)) is under inclusive.</p> <p>4. Paragraph (c) in the Proposed Rule applies to a lawyer's present or former firm. While this tracks Model Rule 1.9, California courts have held that the imputation rules do not extend to a lawyer who has terminated an association with a firm. That lawyer only has duties with respect to the information the lawyer actually acquired at the former firm. The reference to</p>	<p>client arises. See response to comment 1, above.</p> <p>4. The Commission disagrees with the commenter's concern and notes that both (c )(1) and (c )(2) require the lawyer him or herself to have acquired protected information by virtue of the prior representation – this Rule does not impute to the lawyer information known to others within the present or former firm. Imputation is covered by Rule 1.10.</p>

**Proposed Rule 1.9 [3-310(E)] Duties to Former Clients**  
**Synopsis of Public Comments**

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No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI <sup>1</sup>	Rule Section or Cmt.	Comment	RRC Response
					<p>“former firm” in paragraph (c) does not account for the foregoing limitation. It should be removed from paragraph (c).</p> <p><i>5. The Suggested Revision Expands Paragraph (b) To Apply To Any Use Or Disclosure Of Confidential Information</i></p> <p>Proposed paragraph (b) in the Proposed Rule (as well as the Model Rule) addresses the duty with respect to information a obtained by a lawyer while formerly associated with a firm, but proposed paragraph (b) relates only to paragraph (a) in the Proposed Rule. However, proposed paragraph (a) only relates to use or disclosure of confidential information in representational settings. It does not extend to use and disclosure of confidential information in non-representational circumstances, even though the lawyer’s duty is the same and the rules limiting imputation with respect to a lawyer’s former firm should be the same. The Suggested Revision attempts to address this in paragraph (b) by stating that a lawyer who is formerly associated with a firm must comply with all of paragraph (a) and (c) if the</p>	<p>5. The Commission did not make the suggested change. Aside from creating an unnecessary difference in the rules between California and a preponderance of the jurisdictions that have adopted the Model Rule provision, the Commission notes that California courts have had no trouble in applying Model Rule 1.9(b). See <i>Adams v. Aerojet-General Corp.</i>, 86 Cal.App.4th 1324, 104 Cal.Rptr.2d 116 (2001); <i>Ochoa v. Fordel</i>, 146 Cal.App.4th 898, 53 Cal.Rptr.3d 277 (2007) (applying “modified substantial relationship test” as set forth in <i>Adams</i>); <i>Faughn v. Perez</i>, 145 Cal.App.4th 592, 51 Cal.Rptr.3d 692 (2006) (same).</p>

**Proposed Rule 1.9 [3-310(E)] Duties to Former Clients**  
**Synopsis of Public Comments**

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No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI <sup>1</sup>	Rule Section or Cmt.	Comment	RRC Response
					<p>lawyer received confidential information while associated with the former firm. Given that (b) would refer to both (a) and (c), it would make sense to move (b) to the end of the Rule and move paragraph (c) in the Proposed Rule to paragraph (b).</p> <p><i>6. The Suggested Revision Adds Reference To Information Acquired By The Lawyer Or The Lawyer's Firm</i></p> <p>Paragraphs (c)(1) and (c)(2) in the Proposed Rule refer to information "acquired by virtue of representation of the former client" without specifying whether the acquisition is by the lawyer or the firm or both. To provide clarity, the Suggested Draft revises those paragraphs to state that the information was acquired by "the lawyer or firm" by virtue of the representation of the former client.</p> <p><i>7. The Substantial Relationship Test Should Not Be In The Rule</i></p> <p>Under Rule 3-310(E), the focus is on whether the lawyer acquired material confidential information by virtue of representing a former client. That is the relevant inquiry.</p>	<p>6. The Commission has not made the suggested change.</p> <p>7. The Commission disagrees. The substantial relationship test has been used in discipline cases. See, e.g., <i>In the Matter of Lane</i>, 2 Cal. State Bar Ct. Rptr. 735 (1994).</p>

**Proposed Rule 1.9 [3-310(E)] Duties to Former Clients**  
**Synopsis of Public Comments**

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					<p>It is more inclusive in that it focuses on the information the lawyer received rather than the nature of the matter in which the lawyer represented the client. The “same or a substantially related matter” language is an evidentiary standard that is unique to lawyer disqualification motions. The substantial relationship test was not intended to be and does not operate as a substantive rule of law. It is a rule of evidence created specifically for disqualification motions ....</p> <p>The ABA formulation, from which the “same or a substantially related matter” language is derived, has lead courts in other states that have Model Rule 1.9 to fashion an ongoing duty of loyalty to a former client. By adopting an ABA standard, we run the risk of importing this case law into the California court's construction of the new rule. These cases blur the distinction between the duty to maintain a client’s confidential information and not do anything injurious with respect to the matter in which the lawyer represented the former client on the one hand and a duty of loyalty that is not connected to those two duties. There is no functional reason for extending</p>	

**Proposed Rule 1.9 [3-310(E)] Duties to Former Clients**  
**Synopsis of Public Comments**

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					<p>the duty of loyalty to beyond the two duties that the California Supreme Court has repeatedly stated since the 1930s.</p> <p>Changing the current standard in Rule 3-310(E) to the “same or a substantially related matter” is likely to be viewed by some as a new and different standard. It unnecessarily invites litigation at client expense of settled principles based on the new formulation. There is nothing wrong with the current formation in Rule 3-310(E), which is retained in proposed paragraph (c)(3). There is no reason to change the rule.</p>	

**PROPOSED RULE OF PROFESSIONAL CONDUCT 1.13**  
**(Current Rule 3-600)**  
**Organization as Client**

**EXECUTIVE SUMMARY**

The Commission for the Revision of the Rules of Professional Conduct (“Commission”) has evaluated current rule 3-600 (Organization as Client) in accordance with the Commission Charter, with a focus on the function of the rules as disciplinary standards, and with the understanding that the rule comments should be included only when necessary to explain a rule and not for providing aspirational guidance. In addition, the Commission considered the national standard of the American Bar Association (“ABA”) counterpart, Model Rule 1.13 (Organization as Client). The Commission also reviewed relevant California statutes, rules, and case law relating to the issues addressed by the proposed rule. The result of this evaluation is proposed rule 1.13 (Organization as Client). This proposed rule has been adopted by the Commission for submission to the Board of Trustees for public comment authorization. A final recommended rule will follow the public comment process.

Proposed rule 1.13 carries forward the basic concept of current rule 3-600 but with four specific changes. First, proposed rule 1.13 now mandates “reporting up” in certain circumstances. Second, a two-part test with different scienter requirements is applied to determine whether a constituent’s action amounts to an enumerated violation and whether the violation is likely to result in harm to the organization. Third, a lawyer’s “reporting up” requirement is triggered only when both parts of the test have been satisfied. Finally, a lawyer is now required to notify the highest authority in the organization if the lawyer has been discharged or forced to withdraw as a result of his or her “reporting up” requirements.

Paragraph (a) carries forward the concept in current rule 3-600 which provides that when a lawyer represents an organization, the organization is the client acting through its constituents. By substituting the clause, “A lawyer employed or retained by an organization,” for “in representing an organization” in current rule 3-600, paragraph (a) clarifies that the rule applies to both in-house and outside counsel.

Paragraph (b) requires a lawyer to report certain enumerated conduct by a constituent “up the corporate ladder.” This mandate is consistent with the national trend but diverges from current rule 3-600 which permits, but does not require, a lawyer to take such action. A lawyer’s duty to report is triggered by two separate scienter standards: (1) a subjective standard that requires actual knowledge that a constituent is, has, or plans to act and; (2) an objective standard that asks whether a reasonable lawyer would conclude that the constituent’s course of action is a violation of law or a legal duty and likely to result in substantial injury to the organization. Unlike current rule 3-600 which permits a lawyer to take corrective action if there is either a violation of law or likely substantial injury to the organization, paragraph (b) requires that both be present before a lawyer’s duty to report up is triggered.

Paragraph (c) provides that a lawyer must maintain his or her duty of confidentiality when taking action pursuant to paragraph (b).

Paragraph (d) carries forward the concept in current rule 3-600 that if the highest authority in the organization insists on a course of conduct discussed in paragraph (b), the lawyer’s response may include discussion of the lawyer’s duties regarding terminating representation.

Paragraph (e) imposes a duty on a lawyer who is discharged or withdraws in accordance with paragraphs (b) or (d) to notify the organization's highest authority of the lawyer's discharge or withdrawal.

Paragraph (f) carries forward the duty imposed by current Rule 3-600(D) requiring a lawyer for the organization to explain who the client is when it is apparent that the organization's interests are or may become adverse to those of a constituent with whom the lawyer is dealing.

Paragraph (g) carries forward the concept in current Rule 3-600(E) which expressly recognizes that a lawyer may jointly represent the organization and a constituent so long as the requirements of the rules addressing actual or potential conflicts of interest are satisfied.

Comment [1] explains the scope of the rule's application to different organizations, including governmental organizations. The comment also clarifies that the identity of the constituents themselves will depend on the organization's form, structure, and chosen terminology.

Comment [2] discusses a lawyer's duty to defer to constituents' decisions on behalf of the organization. The comment likewise discusses a lawyer's duty to communicate significant developments. Finally, the comment provides that a lawyer may refer to an organization's highest authority even when not mandated by paragraph (b).

Comment [3] explains that paragraph (b) distinguishes between knowledge of the conduct and knowledge of the consequences of the conduct.

Comment [4] provides that it is appropriate, before taking action pursuant to paragraph (b), to urge reconsideration of a constituent's proposed course of action.

Comment [5] explains that a lawyer should not generally substitute the lawyer's judgment for that of the organization's highest authority.

Comment [6] expressly recognizes the difficulty inherent in attempts to generalize the duties of lawyers representing government organizations. This comment clarifies that each government lawyer's situation is different and needs to be assessed within its own structure.

### **Post-Public Comment Revisions**

After consideration of public comment, the Commission revised paragraph (c) for clarity, and also revised the last sentence of Comment [1] to limit the breadth of the statement "[f]or purposes of this Rule." Finally, the Commission deleted the first sentence of Comment [5].

### **Proposed Rule as Amended by the Board of Trustees on November 17, 2016**

After making revisions in response to public comment, the Commission submitted its proposed rule to the Board of Trustees for consideration at the Board's meeting on November 17, 2016. The Board revised the rule to address two issues.

First, in the second sentence of paragraph (g), the Board added the word "constituent" to the list of appropriate persons who may give consent on behalf of the organization to a dual representation of the organization and another person. This was done to retain language used in the current rule.



Second, in the last sentence of Comment [1], the phrase “for purposes of the authorized matter” was deleted as confusing and unnecessary.

With these changes, the Board voted to authorize an additional 45-day public comment period on the proposed rule.

The redline strikeout text below shows the changes made by the Board:

\* \* \* \* \*

- (g) A lawyer representing an organization may also represent any of its constituents, subject to the provisions of Rules 1.7, 1.8.2, 1.8.6, and 1.8.7. If the organization’s consent to the dual representation is required by any of these Rules, the consent shall be given by an appropriate official, constituent, or body of the organization other than the individual who is to be represented, or by the shareholders.

## Comment

[1] This Rule applies to all forms of private, public and governmental organizations. See Comment [6]. An organizational client can only act through individuals who are authorized to conduct its affairs. The identity of an organization’s constituents will depend on its form, structure, and chosen terminology. For example, in the case of a corporation, constituents include officers, directors, employees and shareholders. In the case of other organizational forms, constituents include the equivalents of officers, directors, employees, and shareholders. For purposes of this Rule, any agent or fiduciary authorized to act on behalf of an organization is a constituent of the organization ~~for purposes of the authorized matter.~~

\* \* \* \* \*



**Rule 1.13 [3-600] Organization as Client**  
**(Commission's Proposed Rule Adopted on October 21–22, 2016**  
**as Amended by the Board on November 17, 2016 – Clean Version)**

- (a) A lawyer employed or retained by an organization shall conform his or her representation to the concept that the client is the organization itself, acting through its duly authorized directors, officers, employees, members, shareholders, or other constituents overseeing the particular engagement.
- (b) If a lawyer representing an organization knows\* that a constituent is acting, intends to act or refuses to act in a matter related to the representation in a manner that the lawyer knows\* or reasonably should know\* is (i) a violation of a legal obligation to the organization or a violation of law reasonably\* imputable to the organization, and (ii) likely to result in substantial\* injury to the organization, the lawyer shall proceed as is reasonably\* necessary in the best lawful interest of the organization. Unless the lawyer reasonably believes\* that it is not necessary in the best lawful interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances, to the highest authority that can act on behalf of the organization as determined by applicable law.
- (c) In taking any action pursuant to paragraph (b), the lawyer shall not reveal information protected by Business and Professions Code § 6068(e).
- (d) If, despite the lawyer's actions in accordance with paragraph (b), the highest authority that can act on behalf of the organization insists upon action, or fails to act, in a manner that is a violation of a legal obligation to the organization or a violation of law reasonably\* imputable to the organization, and is likely to result in substantial\* injury to the organization, the lawyer shall continue to proceed as is reasonably\* necessary in the best lawful interests of the organization. The lawyer's response may include the lawyer's right and, where appropriate, duty to resign or withdraw in accordance with Rule 1.16.
- (e) A lawyer who reasonably believes\* that he or she has been discharged because of the lawyer's actions taken pursuant to paragraph (b), or who resigns or withdraws under circumstances described in paragraph (d), shall proceed as the lawyer reasonably believes\* necessary to assure that the organization's highest authority is informed of the lawyer's discharge or withdrawal.
- (f) In dealing with an organization's constituents, a lawyer representing the organization shall explain the identity of the lawyer's client whenever the lawyer knows\* or reasonably should know\* that the organization's interests are adverse to those of the constituent(s) with whom the lawyer is dealing.

- (g) A lawyer representing an organization may also represent any of its constituents, subject to the provisions of Rules 1.7, 1.8.2, 1.8.6, and 1.8.7. If the organization's consent to the dual representation is required by any of these Rules, the consent shall be given by an appropriate official, constituent, or body of the organization other than the individual who is to be represented, or by the shareholders.

## **Comment**

### *The Entity as the Client*

[1] This Rule applies to all forms of private, public and governmental organizations. See Comment [6]. An organizational client can only act through individuals who are authorized to conduct its affairs. The identity of an organization's constituents will depend on its form, structure, and chosen terminology. For example, in the case of a corporation, constituents include officers, directors, employees and shareholders. In the case of other organizational forms, constituents include the equivalents of officers, directors, employees, and shareholders. For purposes of this Rule, any agent or fiduciary authorized to act on behalf of an organization is a constituent of the organization.

[2] A lawyer ordinarily must accept decisions an organization's constituents make on behalf of the organization, even if the lawyer questions their utility or prudence. It is not within the lawyer's province to make decisions on behalf of the organization concerning policy and operations, including ones entailing serious risk. A lawyer, however, has a duty to inform the client of significant developments related to the representation under Business and Professions Code § 6068(m) and Rule 1.4. Even when a lawyer is not obligated to proceed in accordance with paragraph (b), the lawyer may refer to higher authority, including the organization's highest authority, matters that the lawyer reasonably believes\* are sufficiently important to refer in the best interest of the organization subject to Business and Professions Code § 6068(e) and Rule 1.6.

[3] Paragraph (b) distinguishes between knowledge of the conduct and knowledge of the consequences of that conduct. When a lawyer knows\* of the conduct, the lawyer's obligations under paragraph (b) are triggered when the lawyer knows\* or reasonably should know\* that the conduct is (i) a violation of a legal obligation to the organization, or a violation of law reasonably\* imputable to the organization, and (ii) likely to result in substantial\* injury to the organization.

[4] In determining how to proceed under paragraph (b), the lawyer should consider the seriousness of the violation and its potential consequences, the responsibility in the organization and the apparent motivation of the person\* involved, the policies of the organization concerning such matters, and any other relevant considerations. Ordinarily, referral to a higher authority would be necessary. In some circumstances, however, the lawyer may ask the constituent to reconsider the matter. For example, if the circumstances involve a constituent's innocent misunderstanding of law and subsequent acceptance of the lawyer's advice, the lawyer may reasonably\* conclude that the best interest of the organization does not require that the matter be referred to higher authority. If a constituent persists in conduct contrary to the lawyer's advice, it will be necessary for

the lawyer to take steps to have the matter reviewed by a higher authority in the organization. If the matter is of sufficient seriousness and importance or urgency to the organization, referral to higher authority in the organization may be necessary even if the lawyer has not communicated with the constituent. For the responsibility of a subordinate lawyer in representing an organization, see Rule 5.2.

[5] In determining how to proceed in the best lawful interests of the organization, a lawyer should consider the extent to which the organization should be informed of the circumstances, the actions taken by the organization with respect to the matter and the direction the lawyer has received from the organizational client.

### *Governmental Organizations*

[6] It is beyond the scope of this Rule to define precisely the identity of the client and the lawyer's obligations when representing a governmental agency. Although in some circumstances the client may be a specific agency, it may also be a branch of government or the government as a whole. In a matter involving the conduct of government officials, a government lawyer may have authority under applicable law to question such conduct more extensively than that of a lawyer for a private organization in similar circumstances. Duties of lawyers employed by the government or lawyers in military service may be defined by statutes and regulations. In addition, a governmental organization may establish internal organizational rules and procedures that identify an official, agency, organization, or other person\* to serve as the designated recipient of whistle-blower reports from the organization's lawyers, consistent with Business and Professions Code § 6068(e) and Rule 1.6. This Rule is not intended to limit that authority.



**Rule 1.13 [3-600] Organization as Client**  
**(Commission's Proposed Rule Adopted on October 21–22, 2016 as Amended by**  
**the Board on November 17, 2016 – Redline to Public Comment Draft Version)**

- (a) A lawyer employed or retained by an organization shall conform his or her representation to the concept that the client is the organization itself, acting through its duly authorized directors, officers, employees, members, shareholders, or other constituents overseeing the particular engagement.
- (b) If a lawyer representing an organization knows\* that a constituent is acting, intends to act or refuses to act in a matter related to the representation in a manner that the lawyer knows\* or reasonably should know\* is (i) a violation of a legal obligation to the organization or a violation of law reasonably\* imputable to the organization, and (ii) likely to result in substantial\* injury to the organization, the lawyer shall proceed as is reasonably\* necessary in the best lawful interest of the organization. Unless the lawyer reasonably believes\* that it is not necessary in the best lawful interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances, to the highest authority that can act on behalf of the organization as determined by applicable law.
- (c) In taking any action pursuant to paragraph (b), the lawyer shall not ~~violate his or her duty of protecting all~~reveal information protected by Business and Professions Code § 6068(e)(1).
- (d) If, despite the lawyer's actions in accordance with paragraph (b), the highest authority that can act on behalf of the organization insists upon action, or fails to act, in a manner that is a violation of a legal obligation to the organization or a violation of law reasonably\* imputable to the organization, and is likely to result in substantial\* injury to the organization, the lawyer shall continue to proceed as is reasonably\* necessary in the best lawful interests of the organization. The lawyer's response may include the lawyer's right and, where appropriate, duty to resign or withdraw in accordance with Rule 1.16.
- (e) A lawyer who reasonably believes\* that he or she has been discharged because of the lawyer's actions taken pursuant to paragraph (b), or who resigns or withdraws under circumstances described in paragraph (d), shall proceed as the lawyer reasonably believes\* necessary to assure that the organization's highest authority is informed of the lawyer's discharge or withdrawal.
- (f) In dealing with an organization's constituents, a lawyer representing the organization shall explain the identity of the lawyer's client whenever the lawyer knows\* or reasonably should know\* that the organization's interests are adverse to those of the constituent(s) with whom the lawyer is dealing.
- (g) A lawyer representing an organization may also represent any of its constituents, subject to the provisions of Rules 1.7, 1.8.2, 1.8.6, and 1.8.7. If the organization's

consent to the dual representation is required by any of these Rules, the consent shall be given by an appropriate official, constituent, or body of the organization other than the individual who is to be represented, or by the shareholders.

## Comment

### *The Entity as the Client*

[1] This Rule applies to all forms of private, public and governmental organizations. See Comment [6]. An organizational client can only act through individuals who are authorized to conduct its affairs. The identity of an organization's constituents will depend on its form, structure, and chosen terminology. For example, in the case of a corporation, constituents include officers, directors, employees and shareholders. In the case of other organizational forms, constituents include the equivalents of officers, directors, employees, and shareholders. ~~Any~~For purposes of this Rule, any agent or fiduciary authorized to act on behalf of an organization is a constituent of the organization ~~for purposes of the authorized matter.~~

[2] A lawyer ordinarily must accept decisions an organization's constituents make on behalf of the organization, even if the lawyer questions their utility or prudence. It is not within the lawyer's province to make decisions on behalf of the organization concerning policy and operations, including ones entailing serious risk. A lawyer, however, has a duty to inform the client of significant developments related to the representation under ~~Rule 1.4 and~~ Business and Professions Code § 6068(m) and Rule 1.4. Even when a lawyer is not obligated to proceed in accordance with paragraph (b), the lawyer may refer to higher authority, including the organization's highest authority, matters that the lawyer reasonably believes\* are sufficiently important to refer in the best interest of the organization subject to ~~Rule 1.6 and~~ Business and Professions Code § 6068(e) and Rule 1.6.

[3] Paragraph (b) distinguishes between knowledge of the conduct and knowledge of the consequences of that conduct. When a lawyer knows\* of the conduct, the lawyer's obligations under paragraph (b) are triggered when the lawyer knows\* or reasonably should know\* that the conduct is (i) a violation of a legal obligation to the organization, or a violation of law reasonably\* imputable to the organization, and (ii) likely to result in substantial\* injury to the organization.

[4] In determining how to proceed under paragraph (b), the lawyer should consider the seriousness of the violation and its potential consequences, the responsibility in the organization and the apparent motivation of the person\* involved, the policies of the organization concerning such matters, and any other relevant considerations. Ordinarily, referral to a higher authority would be necessary. In some circumstances, however, the lawyer may ask the constituent to reconsider the matter. For example, if the circumstances involve a constituent's innocent misunderstanding of law and subsequent acceptance of the lawyer's advice, the lawyer may reasonably\* conclude that the best interest of the organization does not require that the matter be referred to higher authority. If a constituent persists in conduct contrary to the lawyer's advice, it will be necessary for



the lawyer to take steps to have the matter reviewed by a higher authority in the organization. If the matter is of sufficient seriousness and importance or urgency to the organization, referral to higher authority in the organization may be necessary even if the lawyer has not communicated with the constituent. For the responsibility of a subordinate lawyer in representing an organization, see Rule 5.2.

[5] ~~This Rule does not authorize a lawyer to substitute the lawyer's judgment for that of the organization or to take action on behalf of the organization independently of the direction the lawyer receives from the highest authorized constituent overseeing the particular engagement.~~ In determining how to proceed in the best lawful interests of the organization, a lawyer should consider the extent to which the organization should be informed of the circumstances, the actions taken by the organization with respect to the matter and the direction the lawyer has received from the organizational client.

#### *Governmental Organizations*

[6] It is beyond the scope of this Rule to define precisely the identity of the client and the lawyer's obligations when representing a governmental agency. Although in some circumstances the client may be a specific agency, it may also be a branch of government or the government as a whole. In a matter involving the conduct of government officials, a government lawyer may have authority under applicable law to question such conduct more extensively than that of a lawyer for a private organization in similar circumstances. Duties of lawyers employed by the government or lawyers in military service may be defined by statutes and regulations. In addition, a governmental organization may establish internal organizational rules and procedures that identify an official, agency, organization, or other person\* to serve as the designated recipient of whistle-blower reports from the organization's lawyers, consistent with ~~Rule 1.6 and~~ Business and Professions Code § 6068(e) and Rule 1.6. This Rule is not intended to limit that authority.



**Rule 1.13 [3-600] Organization as Client**  
**(Redline Comparison of the Proposed Rule to Current California Rule)**

- (Aa) ~~In representing~~ A lawyer employed or retained by an organization, ~~a member~~ shall conform his or her representation to the concept that the client is the organization itself, acting through its ~~highest~~ duly authorized ~~officer, employee, body, or constituent~~ directors, officers, employees, members, shareholders, or other constituents overseeing the particular engagement.
- (Bb) If a ~~member acting on behalf of~~ lawyer representing an organization knows\* that ~~an actual or apparent agent of the organization acts or~~ a constituent is acting, intends to act or refuses to act in a matter related to the representation in a manner that ~~is or may be~~ the lawyer knows\* or reasonably should know\* is (i) a violation of a legal obligation to the organization or a violation of law reasonably\* imputable to the organization, ~~or in a manner which is~~ and (ii) likely to result in substantial\* injury to the organization, the ~~member shall not violate his or her duty of protecting all confidential information as provided in Business and Professions Code section 6068, subdivision (e). Subject to Business and Professions Code section 6068, subdivision (e), the member may take such actions as appear to the member to be~~ lawyer shall proceed as is reasonably\* necessary in the best lawful interest of the organization. ~~Such actions may include among others:~~
- Unless the lawyer reasonably believes\* that it is not necessary in the best lawful interest of the organization to do so, the lawyer shall refer (1) ~~Urging reconsideration of the matter while explaining its likely consequences to the organization; or~~
- (2) ~~Referring~~ the matter to ~~the next~~ higher authority in the organization, including, if warranted by the ~~seriousness of the matter, referral~~ circumstances, to the highest ~~internal~~ authority that can act on behalf of the organization as determined by applicable law.
- (c) In taking any action pursuant to paragraph (b), the lawyer shall not reveal information protected by Business and Professions Code § 6068(e).
- (Gd) If, despite the ~~member's~~ lawyer's actions in accordance with paragraph (Bb), the highest authority that can act on behalf of the organization insists upon action, ~~or a refusal~~ fails to act, in a manner that is a violation of ~~law~~ a legal obligation to the organization or a violation of law reasonably\* imputable to the organization, and is likely to result in substantial\* injury to the organization, the ~~member's response is limited to the member's~~ lawyer shall continue to proceed as is reasonably\* necessary in the best lawful interests of the organization. The lawyer's response may include the lawyer's right, and, where appropriate, duty to resign or withdraw in accordance with ~~rule 3-700~~ Rule 1.16.
- (e) A lawyer who reasonably believes\* that he or she has been discharged because of the lawyer's actions taken pursuant to paragraph (b), or who resigns or withdraws

under circumstances described in paragraph (d), shall proceed as the lawyer reasonably believes\* necessary to assure that the organization's highest authority is informed of the lawyer's discharge or withdrawal.

- (~~D~~f) In dealing with an organization's ~~directors, officers, employees, members, shareholders, or other~~ constituents, a ~~member~~lawyer representing the organization shall explain the identity of the lawyer's client ~~for whom the member acts,~~ whenever ~~it is or becomes apparent~~the lawyer knows\* or reasonably should know\* that the organization's interests are ~~or may become~~ adverse to those of the constituent(s) with whom the ~~member~~lawyer is dealing. ~~The member shall not mislead such a constituent into believing that the constituent may communicate confidential information to the member in a way that will not be used in the organization's interest if that is or becomes adverse to the constituent.~~
- (Eg) A ~~member~~lawyer representing an organization may also represent any of its ~~directors, officers, employees, members, shareholders, or other~~ constituents, subject to the provisions of ~~rule 3-310~~Rules 1.7, 1.8.2, 1.8.6, and 1.8.7. If the organization's consent to the dual representation is required by ~~rule 3-310~~any of these Rules, the consent shall be given by an appropriate official, constituent, or body of the organization other than the individual ~~or constituent~~ who is to be represented, or by the ~~shareholder(s) or organization members~~shareholders.

## Comment~~Discussion~~

### The Entity as the Client

[1] This Rule applies to all forms of private, public and governmental organizations. See Comment [6]. An organizational client can only act through individuals who are authorized to conduct its affairs. The identity of an organization's constituents will depend on its form, structure, and chosen terminology. For example, in the case of a corporation, constituents include officers, directors, employees and shareholders. In the case of other organizational forms, constituents include the equivalents of officers, directors, employees, and shareholders. For purposes of this Rule, any agent or fiduciary authorized to act on behalf of an organization is a constituent of the organization.

[2] A lawyer ordinarily must accept decisions an organization's constituents make on behalf of the organization, even if the lawyer questions their utility or prudence. It is not within the lawyer's province to make decisions on behalf of the organization concerning policy and operations, including ones entailing serious risk. A lawyer, however, has a duty to inform the client of significant developments related to the representation under Business and Professions Code § 6068(m) and Rule 1.4. Even when a lawyer is not obligated to proceed in accordance with paragraph (b), the lawyer may refer to higher authority, including the organization's highest authority, matters that the lawyer reasonably believes\* are sufficiently important to refer in the best interest of the organization subject to Business and Professions Code § 6068(e) and Rule 1.6.

[3] Paragraph (b) distinguishes between knowledge of the conduct and knowledge of the consequences of that conduct. When a lawyer knows\* of the conduct, the lawyer's obligations under paragraph (b) are triggered when the lawyer knows\* or reasonably should know\* that the conduct is (i) a violation of a legal obligation to the organization, or a violation of law reasonably\* imputable to the organization, and (ii) likely to result in substantial\* injury to the organization.

[4] In determining how to proceed under paragraph (b), the lawyer should consider the seriousness of the violation and its potential consequences, the responsibility in the organization and the apparent motivation of the person\* involved, the policies of the organization concerning such matters, and any other relevant considerations. Ordinarily, referral to a higher authority would be necessary. In some circumstances, however, the lawyer may ask the constituent to reconsider the matter. For example, if the circumstances involve a constituent's innocent misunderstanding of law and subsequent acceptance of the lawyer's advice, the lawyer may reasonably\* conclude that the best interest of the organization does not require that the matter be referred to higher authority. If a constituent persists in conduct contrary to the lawyer's advice, it will be necessary for the lawyer to take steps to have the matter reviewed by a higher authority in the organization. If the matter is of sufficient seriousness and importance or urgency to the organization, referral to higher authority in the organization may be necessary even if the lawyer has not communicated with the constituent. For the responsibility of a subordinate lawyer in representing an organization, see Rule 5.2.

[5] In determining how to proceed in the best lawful interests of the organization, a lawyer should consider the extent to which the organization should be informed of the circumstances, the actions taken by the organization with respect to the matter and the direction the lawyer has received from the organizational client.

### Governmental Organizations

[6] It is beyond the scope of this Rule to define precisely the identity of the client and the lawyer's obligations when representing a governmental agency. Although in some circumstances the client may be a specific agency, it may also be a branch of government or the government as a whole. In a matter involving the conduct of government officials, a government lawyer may have authority under applicable law to question such conduct more extensively than that of a lawyer for a private organization in similar circumstances. Duties of lawyers employed by the government or lawyers in military service may be defined by statutes and regulations. In addition, a governmental organization may establish internal organizational rules and procedures that identify an official, agency, organization, or other person\* to serve as the designated recipient of whistle-blower reports from the organization's lawyers, consistent with Business and Professions Code § 6068(e) and Rule 1.6. This Rule is not intended to limit that authority.

~~Rule 3-600 is not intended to enmesh members in the intricacies of the entity and aggregate theories of partnership.~~

~~Rule 3-600 is not intended to prohibit members from representing both an organization and other parties connected with it, as for instance (as simply one example) in establishing employee benefit packages for closely held corporations or professional partnerships.~~

~~Rule 3-600 is not intended to create or to validate artificial distinctions between entities and their officers, employees, or members, nor is it the purpose of the rule to deny the existence or importance of such formal distinctions. In dealing with a close corporation or small association, members commonly perform professional engagements for both the organization and its major constituents. When a change in control occurs or is threatened, members are faced with complex decisions involving personal and institutional relationships and loyalties and have frequently had difficulty in perceiving their correct duty. (See *People ex rel Deukmejian v. Brown* (1981) 29 Cal.3d 150 [172 Cal.Rptr. 478]; *Goldstein v. Lees* (1975) 46 Cal.App.3d 614 [120 Cal.Rptr. 253]; *Woods v. Superior Court* (1983) 149 Cal.App.3d 931 [197 Cal.Rptr. 185]; *In re Banks* (1978) 283 Ore. 459 [584 P.2d 284]; 1 A.L.R.4th 1105.) In resolving such multiple relationships, members must rely on case law.~~

**Proposed Rule 1.13 [3-600] Organization as Client  
Synopsis of Public Comments**

<b>TOTAL = 4</b>	<b>A = 1</b>
	<b>D = 0</b>
	<b>M = 2</b>
	<b>NI = 1</b>

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI <sup>1</sup>	Rule Section or Cmt.	Comment	RRC Response
X-2016-43be	Committee on Professional Responsibility and Conduct (COPRAC) (Baldwin) (9-8-16)	Y	A	(c)	Paragraph (c) should refer simply to 6068(e), not specifically (e)(1).	The Commission agrees that in this instance, reference to subdivision (e) is appropriate and has made the change.
X-2016-56	Brown, David (8-31-2016)	N	NI	1.13	<p>Commenter cites two examples where government lawyer placed the interests of the governing body and their staff above those of the constituents.</p> <p>If attorneys aren't acting as fiduciaries for their real clients (the public) then government money is at risk.</p> <p>Attorneys should serve the right master and be held accountable if they don't.</p>	The Commission recognizes that it can be more difficult in the governmental than the private setting to identify the "client" or those authorized to speak for the "client". Rather than attempting to create governmental-specific definitions, which the Commission does not think would be possible, it has referred to the complexity of this issue in proposed Comment [1]. Nevertheless, the starting point is that the client of a lawyer for a public agency is the agency itself, not its constituents, not the voters or the public, and not what the lawyer believes is in the best interests of the voters or the public. If the lawyer believes that agency is acting inappropriately he or she proceed as provided under paragraph (b) and may resign, as lawyers for private clients are able to do in certain

<sup>1</sup> A = AGREE with proposed Rule    D = DISAGREE with proposed Rule    M = AGREE ONLY IF MODIFIED    NI = NOT INDICATED

**Proposed Rule 1.13 [3-600] Organization as Client  
Synopsis of Public Comments**

**TOTAL = 4**      **A = 1**  
**D = 0**  
**M = 2**  
**NI = 1**

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI <sup>1</sup>	Rule Section or Cmt.	Comment	RRC Response
						situations.
X-2016-86b	U.S. Department of Justice (Ludwig) (9-27-16)	Y	M	Cmt. 1	Limit definition of “constituent” to this rule so it doesn’t conflict with Rule 4.2(b).	The Commission has revised the last sentence of Cmt. [1] to clarify that constituent has the stated meaning “for purposes of this Rule.”
X-2016-104ab	State Bar of California, Office of Chief Trial Counsel (OCTC) (Dressler) (9-27-16)	Y	M	(b), cmts. 2-5	<p>1. Generally supports this rule, but has the same concerns regarding use of the term “knowing” in subsection (b) of this rule as it has for proposed Rule 1.9 and the General Comments section of this letter, i.e., By using the term “knowingly” in this subsection the Commission is excluding attorneys who commit a violation by recklessness, gross negligence, or willful blindness.</p> <p>2. Supports Comments 1, 2, 4, and 6, except Comment 2 may need to be rewritten if the Commission revises its proposals to have a single rule for</p>	<p>1. The Commission has considered this issue when drafting the rule and determined that the “know” standard is the appropriate standard for this rule. First, it is a national standard, every jurisdiction having adopted it. Second, the definition in proposed Rule 1.0.1(f) provides:</p> <p>“Knowingly,” “known,” or “knows” means actual knowledge of the fact in question. A person’s knowledge may be inferred from circumstances.</p> <p>The second sentence of that definition prohibits “willful blindness.”</p> <p>2. The Commission has not made the suggested change because it continues to believe that competence, diligence, and supervision should be set</p>



**Proposed Rule 1.13 [3-600] Organization as Client  
Synopsis of Public Comments**

**TOTAL = 4**      **A = 1**  
**D = 0**  
**M = 2**  
**NI = 1**

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI <sup>1</sup>	Rule Section or Cmt.	Comment	RRC Response
					<p>competence, diligence, and supervision.</p> <p>3. Has the same concerns regarding use of the term “knowing” in Comment 3 for the same reasons it has concerns about subsection (b) of this rule, as well as proposed Rule 1.9 and the General Comments section of this letter.</p> <p>4. Comment 5 appears to cover the same issues as Comment 2 and, thus, is unnecessary and should be stricken.</p>	<p>forth in separate rules.</p> <p>3. See response to comment 1.</p> <p>4. The Commission disagrees that all of Comment [5] covers the same issues as Comment [2] but has retained only the last sentence of that comment, which provides important interpretative guidance on the meaning and application of the term, “best lawful interests.”</p>



**PROPOSED RULE OF PROFESSIONAL CONDUCT 5.3.1**  
**(Current Rule 1-311)**  
**Employment of Disbarred, Suspended, Resigned, or Involuntary Inactive Member**

**EXECUTIVE SUMMARY**

The Commission for the Revision of the Rules of Professional Conduct (“Commission”) has evaluated current rule 1-311 (Employment of Disbarred, Suspended, Resigned, or Involuntary Inactive Member) in accordance with the Commission Charter, with a focus on the function of the rule as a disciplinary standard, and with the understanding that the rule comments should be included only when necessary to explain a rule and not for providing aspirational guidance. There is no counterpart to rule 1-311 in the American Bar Association (“ABA”) Model Rules. The Commission also reviewed relevant California statutes, rules, and case law relating to the issues addressed by the proposed rule. The result of the Commission’s evaluation is proposed rule 5.3.1 (Employment of Disbarred, Suspended, Resigned, or Involuntary Inactive Member). This proposed rule has been adopted by the Commission for submission to the Board of Trustees for public comment authorization. A final recommended rule will follow the public comment process.

Current rule 1-311 governs the employment activities of certain lawyers who are not entitled to practice law, specifically disbarred, suspended, resigned, or involuntary inactive members who work in law offices. The rule imposes duties on an attorney employing, or professionally associating with, a lawyer who is not entitled to practice. These duties include a requirement to give notice to both the State Bar as well as to each client on whose specific matter such person will work. The notice to the State Bar ensures that the bar can provide oversight while the notice to client ensures greater transparency by giving the client an opportunity to object to the restricted attorney working on his or her case. In proposed rule 5.3.1, the Commission made no substantive changes to current rule 1-311. The Commission reasoned that having this rule serves a valuable public protection benefit as well as provides an opportunity for the restricted attorney to work in a law office (within the parameters established by the rule) and to assist with his or her rehabilitation and potential reinstatement to active status.<sup>1</sup>

The non-substantive changes proposed were intended to clarify, update and streamline the existing rule. Throughout the rule, conforming language changes include: the phrase “associate in practice” is substituted for “associate professionally with” the word “assist” is substituted for “aid” and “restricted lawyer” is defined. Other changes include the deletion of all the Discussion sections of the current rule except for language that clarifies a hiring lawyer’s obligation to give notice to a client when the client is an organization.

**National Background – Adoption of Rule Addressing Law-related Activities of Disbarred, Suspended, Resigned or Involuntarily Inactive Attorneys**

As there is currently no ABA Model Rule counterpart to the current or proposed California rules on this topic, this section reports on the adoption of a similar rule in other United States’ jurisdictions. Three states have adopted a rule of professional conduct similar to current rule 1-311 in that they require the employing attorney to provide notice when employing a

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<sup>1</sup> One member of the Commission submitted a written dissent disagreeing with the Commission’s threshold determination that the current rule should be retained. The full text of the dissent is attached to this summary.

suspended or disbarred attorney: Colorado, Maryland, Minnesota, and Alaska. Alaska incorporates a bar rule that similarly requires an employing attorney to serve upon the Alaska Bar Association written notice of the employment of a disbarred, suspended, resigned, or involuntarily inactive attorney.<sup>2</sup>

Seven states prohibit suspended or disbarred attorneys from working in law-related activities: Idaho, Illinois, Indiana, Massachusetts, New Jersey, South Carolina, and Washington.

Nine states partially restrict the work of suspended or disbarred lawyers in law-related activities in their rules of professional conduct. For example, Georgia and Hawaii prohibit a suspended or disbarred attorney from contacting another lawyer's clients "either in person, by telephone or in writing." (See, Georgia Rule of Professional Conduct 5.3(d) (Responsibilities Regarding Nonlawyer Assistants); and Hawaii Rule of Professional Conduct 5.5(c) (Unauthorized Practice of Law.))<sup>3</sup>

Finally, twenty states have no rule or regulation addressing law-related activities of disbarred, suspended, resigned or involuntarily inactive attorneys.

### **Post-Public Comment Revisions**

The Commission did not revise the proposed rule in response to public comment.

### **Proposed Rule as Amended by the Board of Trustees on November 17, 2016**

After public comment, the Commission's proposed rule was considered by the Board of Trustees at its meeting on November 17, 2016. The Board specifically evaluated the Commission's defined term "restricted lawyer" and substituted the term with "ineligible person." This was done to avoid any unintended inference that a disbarred or resigned member remains a person who should be designated as a "lawyer." With these changes, the Board voted to authorize an additional 45-day public comment period on the proposed rule.

The redline strikeout text below shows the changes made by the Board:

(a) For purposes of this Rule:

\* \* \* \* \*

- (5) "~~Restricted lawyer~~Ineligible person" means a member whose current status with the State Bar of California is disbarred, suspended, resigned, or involuntarily inactive.

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<sup>2</sup> See, Colorado Rule of Professional Conduct 5.5; Maryland Rule of Professional Conduct 5.3; and Minnesota Rule of Professional Conduct 5.8; Alaska Bar Rule 15(c): Employment of Disbarred, Suspended or Resigned Attorney. Maryland and Minnesota require notice to be served upon the state bar, while Colorado requires written notice to be provided to the client.

<sup>3</sup> Other states partially restricting the employment of suspended or disbarred members include: Florida (Rule of Discipline 3-6.1), Louisiana (Rule of Professional Conduct 5.5(e)), New Mexico (Rule of Professional Conduct 16-505(B) and (C)), North Carolina (Rule of Professional Conduct 5.5(e) and (f)), Virginia (Rule of Professional Conduct 5.5 (a) and (b)), Washington (Rule of Professional Conduct 5.8(b)), and Wyoming (Rules of Professional Conduct 8.4(g)).

- (b) A lawyer shall not employ, associate in practice with, or assist a person\* the lawyer knows\* or reasonably should know\* is ~~a restricted lawyer~~ an ineligible person to perform the following on behalf of the lawyer's client:
- (1) Render legal consultation or advice to the client;
  - (2) Appear on behalf of a client in any hearing or proceeding or before any judicial officer, arbitrator, mediator, court, public agency, referee, magistrate, commissioner, or hearing officer;
  - (3) Appear as a representative of the client at a deposition or other discovery matter;
  - (4) Negotiate or transact any matter for or on behalf of the client with third parties;
  - (5) Receive, disburse or otherwise handle the client's funds; or
  - (6) Engage in activities that constitute the practice of law.
- (c) A lawyer may employ, associate in practice with, or assist ~~a restricted lawyer~~ an ineligible person to perform research, drafting or clerical activities, including but not limited to:
- (1) Legal work of a preparatory nature, such as legal research, the assemblage of data and other necessary information, drafting of pleadings, briefs, and other similar documents;
  - (2) Direct communication with the client or third parties regarding matters such as scheduling, billing, updates, confirmation of receipt or sending of correspondence and messages; or
  - (3) Accompanying an active lawyer in attending a deposition or other discovery matter for the limited purpose of providing clerical assistance to the active lawyer who will appear as the representative of the client.
- (d) Prior to or at the time of employing, associating in practice with, or assisting a person\* the lawyer knows\* or reasonably should know\* is ~~a restricted lawyer~~ an ineligible person, the lawyer shall serve upon the State Bar written\* notice of the employment, including a full description of such person's current bar status. The written\* notice shall also list the activities prohibited in paragraph (b) and state that the ~~restricted lawyer~~ ineligible person will not perform such activities. The lawyer shall serve similar written\* notice upon each client on whose specific matter such person\* will work, prior to or at the time of employing, associating with, or assisting such person\* to work on the client's specific matter. The lawyer shall obtain proof of service of the client's written\* notice and shall retain such proof and a true and correct copy of the client's written\* notice for two years following termination of the lawyer's employment by the client.
- (e) A lawyer may, without client or State Bar notification, employ, associate in practice with, or assist ~~a restricted lawyer~~ an ineligible person whose sole function is to perform office physical plant or equipment maintenance, courier or delivery services, catering, reception, typing or transcription, or other similar support activities.

- (f) When the lawyer no longer employs, associates in practice with, or assists the ~~restricted lawyer~~ ineligible person, the lawyer shall promptly serve upon the State Bar written\* notice of the termination.

\* \* \* \* \*

**Commission Member Dissent to the Recommended Adoption  
of Proposed Rule 5.3.1, Submitted by Daniel E. Eaton**

I believe that Rule 1-311, dealing with the employment of disempowered attorneys by members of the Bar, should be dropped from the revised Rules of Professional Conduct. The one piece of the rule worth saving should be moved to Rule 1-300. Keeping the rule retains an unnecessary non-conformity with the professional rules in effect in the preponderance of the states. Lawyers who employ disempowered attorneys don't need it to know how such sidelined members of the Bar may be engaged. State Bar prosecutors don't need it to be able to pursue discipline for employing attorneys who assist disempowered practice attorneys in practicing law. And disempowered attorneys don't need a rule not even directed at them to know what they may and may not do while they are sidelined. I respectfully dissent in principle from the Commission's retention of 1-311.

"The Rules of Professional Conduct are intended not only to establish ethical standards of members of the bar, but also designed to protect the members of the public." (*Ames v. State Bar* (1973) 8 Cal.3d 910, 917, citations omitted, rejecting disciplined attorney's contention that consent of client or the fairness of an attorney-client transaction rendered professional conduct rule regulating such a transaction in operative.) The first principle of this Commission's Charter from the State Bar Board of Trustees captures that declaration: "The Commission's work should promote confidence in the legal profession and the administration of justice, and ensure adequate protection of the public." (Commission Charter, Principle 1.)

Principle 3 of the Commission's Charter directs the analysis of whether a particular existing Rule should be revised and, if so, how: "The Commission should begin with the current Rules and focus on revisions that (a) are necessary to address changes in law and (b) eliminate, when and if appropriate, **unnecessary** differences between California's rules and the rules used by a preponderance of the states (in some cases in reliance on the American Bar Association's Model Rules) in order to promote a national standard with respect to professional responsibility issues **whenever possible**." (Emphasis added.)

Rule of Professional Conduct 1-311 is entitled "Employment of Disbarred, Suspended, Resigned, or Involuntarily Inactive Member." It was adopted by the California Supreme Court in 1996 over the dissent of Justice Joyce Kennard. The Rule has six subparts. Paragraph (A) defines the terms "employ," "involuntarily inactive member," and "resigned member." Paragraph (B), the core of the Rule, sets out six tasks the employing member of the Bar may not employ a disempowered attorney to do on behalf of the employing member's clients. Subparagraph 6 of this paragraph has the catchall prohibition on employing such an attorney to "[e]ngage in activities which constitute the practice of law." Paragraph (C) identifies three non-exhaustive types of "research, drafting or clerical activities" the employing attorney may employ a disempowered lawyer to do. Paragraph (D) requires the employing attorney to serve a written notice of the employment of the disbarred attorney on the State Bar, listing the prohibited activities in paragraph (B) and confirming that the disempowered attorney is not being employed to perform any of those activities. Paragraph (D) also requires the employing attorney to serve a similar written notice on each client on whose matter the disempowered attorney will work before or at the time the disempowered attorney begins to work on the client's matter and further requires the employing attorney to retain that notice for two years with proof that it was served. Paragraph (E) expressly allows the employing attorney, without notifying clients or the Bar, to hire the disempowered attorney exclusively to do such support services as typing,

catering, reception, and maintenance. Paragraph (F) requires the employing member to notify the Bar when the services of the disempowered attorney are terminated.

The substance of Rule 1-311 is not found in the ABA Model Rules and is not found in the professional rules of 46 other states. The continued presence of Rule 1-311 in the California Rules of Professional Conduct is an unnecessary non-conformity with the rules used by the preponderance of the states. The essence of the Rule would remain in Business and Professions Code § 6133: “Any attorney or any law firm, partnership, corporation, or association employing an attorney who has resigned, or who is under actual suspension from the practice of law, or is disbarred, shall not permit that attorney to practice law or so advertise or hold himself or herself out as practicing law and shall supervise him or her in any other assigned duties. A willful violation of this section constitutes a cause for discipline.” This provision was enacted in 1988. It captures all of paragraph (B) of the existing rule. Indeed, by requiring the employing attorney to supervise the disempowered attorney in the latter’s assigned duties, § 6133 appropriately goes beyond what is required by Rule 1-311. It is not clear that the continued presence of this Rule, with a limited exception addressed below, adds anything to the ability of the State Bar to prosecute those who would employ a disempowered attorney to practice law. And yet there it is.

Paragraph (B) is not necessary to tell the disempowered attorney and an attorney who would employ him what he may do. It is useful to repeat that Rule 1-311 is not directed at the disempowered attorney at all, only to the attorney who would employ him or her. Even without this Rule, the law is clear for both employer and employee that a disempowered attorney may not in any way, shape, or form practice law or be employed to do so. Period. Subparagraphs 1-5 of Paragraph (B) add nothing to subparagraph 6, which in turn adds nothing to Rule 1-300. Subparts 1-5 may confuse the practitioner seeking guidance, who may understandably assume that the activities listed in those subparts comprise some special category of activities that are not quite the practice of law prohibited by subpart 6. What it means to “practice law” has been ably handled by the courts, including the State Bar Review Department. (See e.g., *Birbrower, Montalbano, Condon & Frank v. Superior Court* (1998) 17 Cal.4th 119, 128 (collecting cases); *Farnham v. State Bar* (1976) 17 Cal.3d 605; *Estate of Condon v. McHenry* (1998) 65 Cal.App.4th 1138, 1142-1143.) That is where those looking for guidance on this question, both the disempowered attorney and the one who would employ him or her, should turn, not the Rules of Professional Conduct.

It may be argued that Paragraphs (C) and (E) are still important because they guide the employing attorney in assigning the disempowered attorney appropriate tasks and thereby encourage the rehabilitation of the disempowered attorney. There are at least two responses to that argument.

First, it should be self-evident that not all roads to vocational redemption for the disempowered lawyer lead through a law office. For one thing, seven states prohibit suspended or disbarred lawyers from engaging in any law-related activities, a bar that presumably does not preclude those lawyers’ rehabilitation through other means. There are other ways for a disempowered lawyer to carry the heavy burden of demonstrating the “exemplary” behavior “over a meaningful period of time” required for reinstatement. (*In re Gossage* (2000) 23 Cal.4th 1080, 1097.) That is why any defense of this Rule on the ground that its elimination would make the disempowered lawyer altogether unemployable makes no sense. The omission of these provisions would not even make the disempowered lawyer less employable since anyone at all may perform the tasks that are listed in Paragraphs (C) and (E), and there is nothing in the Rules that says that a disempowered lawyer may not be employed by an active lawyer at all.



Second, a disciplinary rule, the violation of which may lead to punishment of the employing attorney, is an odd place to set out a purported rehabilitating mechanism that gives no positive incentive to the employing attorney to help the wayward, sidelined attorney. In any event are the Rules of Professional Conduct, given their purpose, really the place to advance even such a noble end?

All of that said, I would not discard Rule 1-311 in its entirety. The requirement that the employing attorney provide contemporaneous written notice to clients on whose matters the disempowered is being engaged to work serves the purpose of these Rules to protect the public, especially the public consisting of clients. The same could be said I suppose of a rule requiring written notice to a client of anyone convicted of criminal fraud to work on their matters. I would transfer this part of the Rule to Rule 1-300 (A), addressing the unauthorized practice of law.

Rule 1-300 (A) reads: "A member shall not aid any person or entity in the unauthorized practice of law." One of three other states that have such a rule, Colorado, places the substance of the current Rule 1-311 under its rule prohibiting an attorney to assist others in the unauthorized practice of law. (See, Colorado Rule 5.5.) Rule 5.5 also is the ABA Rule addressing the unauthorized practice of law. Annotations under Rule 5.5. as it has been adopted in other states deal with the same kind of conduct as addressed in Rule 1-311. See e.g., *Ky. Bar Ass'n v. Unnamed Attorney* (Ky. 2006) 191 S.W.3d 640 (Lawyer disciplined for employing suspended lawyer and telling clients that employee was not practicing law for "health" and other reasons.) I would make the client notification provision of Rule 1-311 new Paragraph (B) of Rule 1-300 and make what is now Paragraph 1-300(B) a new Paragraph 1-300(C).

But that is the only part of Rule 1-311 that I would keep. The Commission learned from the Office of Chief Trial Counsel that lawyers who have employed disempowered attorneys have filed over 1,000 written notices of having done so with the State Bar under this Rule. Impressive, but what ethical purpose does that really serve? Violation of the written notice provision gives the Bar an additional ground to punish a lawyer who has assisted a disempowered attorney in the practice of law. But the employing attorney is subject to discipline for that under Rule 1-300 anyway. And what of the lawyer who employs a disempowered attorney to perform non-legal tasks without serving the written notice with the Bar? In that case, violation of the notice furnishes a unique ground to seek discipline of the unwary employing lawyer. In my view, the provision requiring written notice to the Bar gives rise to what is essentially either redundant discipline or it is a trap for the unwary. Either way, it should go.

Yes, we start with the Rules as they exist, but our mandate goes beyond that. I regret that we have missed a rare opportunity to eliminate an unnecessary non-conformity with the rules prevailing in the vast majority of the states. I respectfully dissent.



**Rule 5.3.1 [1-311] Employment of Disbarred,  
Suspended, Resigned, or Involuntarily Inactive Lawyer  
(Commission's Proposed Rule Adopted on October 21–22, 2016  
as Amended by the Board on November 17, 2016 – Clean Version)**

- (a) For purposes of this Rule:
  - (1) “Employ” means to engage the services of another, including employees, agents, independent contractors and consultants, regardless of whether any compensation is paid;
  - (2) “Member” means a member of the State Bar of California.
  - (3) “Involuntarily inactive member” means a member who is ineligible to practice law as a result of action taken pursuant to Business and Professions Code §§ 6007, 6203(d)(1), or California Rule of Court 9.31(d).
  - (4) “Resigned member” means a member who has resigned from the State Bar while disciplinary charges are pending.
  - (5) “Ineligible person” means a member whose current status with the State Bar of California is disbarred, suspended, resigned, or involuntarily inactive.
- (b) A lawyer shall not employ, associate in practice with, or assist a person\* the lawyer knows\* or reasonably should know\* is an ineligible person to perform the following on behalf of the lawyer’s client:
  - (1) Render legal consultation or advice to the client;
  - (2) Appear on behalf of a client in any hearing or proceeding or before any judicial officer, arbitrator, mediator, court, public agency, referee, magistrate, commissioner, or hearing officer;
  - (3) Appear as a representative of the client at a deposition or other discovery matter;
  - (4) Negotiate or transact any matter for or on behalf of the client with third parties;
  - (5) Receive, disburse or otherwise handle the client’s funds; or
  - (6) Engage in activities that constitute the practice of law.
- (c) A lawyer may employ, associate in practice with, or assist an ineligible person to perform research, drafting or clerical activities, including but not limited to:

- (1) Legal work of a preparatory nature, such as legal research, the assemblage of data and other necessary information, drafting of pleadings, briefs, and other similar documents;
  - (2) Direct communication with the client or third parties regarding matters such as scheduling, billing, updates, confirmation of receipt or sending of correspondence and messages; or
  - (3) Accompanying an active lawyer in attending a deposition or other discovery matter for the limited purpose of providing clerical assistance to the active lawyer who will appear as the representative of the client.
- (d) Prior to or at the time of employing, associating in practice with, or assisting a person\* the lawyer knows\* or reasonably should know\* is an ineligible person, the lawyer shall serve upon the State Bar written\* notice of the employment, including a full description of such person's current bar status. The written\* notice shall also list the activities prohibited in paragraph (b) and state that the ineligible person will not perform such activities. The lawyer shall serve similar written\* notice upon each client on whose specific matter such person\* will work, prior to or at the time of employing, associating with, or assisting such person\* to work on the client's specific matter. The lawyer shall obtain proof of service of the client's written\* notice and shall retain such proof and a true and correct copy of the client's written\* notice for two years following termination of the lawyer's employment by the client.
- (e) A lawyer may, without client or State Bar notification, employ, associate in practice with, or assist an ineligible person whose sole function is to perform office physical plant or equipment maintenance, courier or delivery services, catering, reception, typing or transcription, or other similar support activities.
- (f) When the lawyer no longer employs, associates in practice with, or assists the ineligible person, the lawyer shall promptly serve upon the State Bar written\* notice of the termination.

### **Comment**

If the client is an organization, the lawyer shall serve the notice required by paragraph (d) on its highest authorized officer, employee, or constituent overseeing the particular engagement. (See Rule 1.13.)

**Rule 5.3.1 [1-311] Employment of Disbarred,  
Suspended, Resigned, or Involuntarily Inactive Lawyer  
(Commission's Proposed Rule Adopted on October 21–22, 2016 as Amended by  
the Board on November 17, 2016 – Redline to Public Comment Draft Version)**

- (a) For purposes of this Rule:
- (1) “Employ” means to engage the services of another, including employees, agents, independent contractors and consultants, regardless of whether any compensation is paid;
  - (2) “Member” means a member of the State Bar of California.
  - (3) “Involuntarily inactive member” means a member who is ineligible to practice law as a result of action taken pursuant to Business and Professions Code §§ 6007, 6203(d)(1), or California Rule of Court 9.31(d).
  - (4) “Resigned member” means a member who has resigned from the State Bar while disciplinary charges are pending.
  - (5) “~~Restricted lawyer~~ineligible person” means a member whose current status with the State Bar of California is disbarred, suspended, resigned, or involuntarily inactive.
- (b) A lawyer shall not employ, associate in practice with, or assist a person\* the lawyer knows\* or reasonably should know\* is ~~a restricted lawyer~~an ineligible person to perform the following on behalf of the lawyer’s client:
- (1) Render legal consultation or advice to the client;
  - (2) Appear on behalf of a client in any hearing or proceeding or before any judicial officer, arbitrator, mediator, court, public agency, referee, magistrate, commissioner, or hearing officer;
  - (3) Appear as a representative of the client at a deposition or other discovery matter;
  - (4) Negotiate or transact any matter for or on behalf of the client with third parties;
  - (5) Receive, disburse or otherwise handle the client’s funds; or
  - (6) Engage in activities that constitute the practice of law.
- (c) A lawyer may employ, associate in practice with, or assist ~~a restricted lawyer~~an ineligible person to perform research, drafting or clerical activities, including but not limited to:

- (1) Legal work of a preparatory nature, such as legal research, the assemblage of data and other necessary information, drafting of pleadings, briefs, and other similar documents;
  - (2) Direct communication with the client or third parties regarding matters such as scheduling, billing, updates, confirmation of receipt or sending of correspondence and messages; or
  - (3) Accompanying an active lawyer in attending a deposition or other discovery matter for the limited purpose of providing clerical assistance to the active lawyer who will appear as the representative of the client.
- (d) Prior to or at the time of employing, associating in practice with, or assisting a person\* the lawyer knows\* or reasonably should know\* is ~~a restricted lawyer~~an ineligible person, the lawyer shall serve upon the State Bar written\* notice of the employment, including a full description of such person's current bar status. The written\* notice shall also list the activities prohibited in paragraph (b) and state that the ~~restricted lawyer~~ineligible person will not perform such activities. The lawyer shall serve similar written\* notice upon each client on whose specific matter such person\* will work, prior to or at the time of employing, associating with, or assisting such person\* to work on the client's specific matter. The lawyer shall obtain proof of service of the client's written\* notice and shall retain such proof and a true and correct copy of the client's written\* notice for two years following termination of the lawyer's employment by the client.
- (e) A lawyer may, without client or State Bar notification, employ, associate in practice with, or assist ~~a restricted lawyer~~an ineligible person whose sole function is to perform office physical plant or equipment maintenance, courier or delivery services, catering, reception, typing or transcription, or other similar support activities.
- (f) When the lawyer no longer employs, associates in practice with, or assists the ~~restricted lawyer~~ineligible person, the lawyer shall promptly serve upon the State Bar written\* notice of the termination.

### **Comment**

If the client is an organization, the lawyer shall serve the notice required by paragraph (d) on its highest authorized officer, employee, or constituent overseeing the particular engagement. (See Rule 1.13.)

**Rule 5.3.1 [1-311] Employment of Disbarred,  
Suspended, Resigned, or Involuntarily Inactive ~~Member~~Lawyer  
(Redline Comparison of the Proposed Rule to Current California Rule)**

(Aa) For purposes of this ~~rule~~Rule:

(1) “Employ” means to engage the services of another, including employees, agents, independent contractors and consultants, regardless of whether any compensation is paid;

(2) “Member” means a member of the State Bar of California.

(~~23~~) “Involuntarily inactive member” means a member who is ineligible to practice law as a result of action taken pursuant to Business and Professions Code ~~sections~~§§ 6007, 6203(~~ed~~(1)), or California Rule of Court 9.31~~;~~and(d).

(~~34~~) “Resigned member” means a member who has resigned from the State Bar while disciplinary charges are pending.

(5) “Ineligible person” means a member whose current status with the State Bar of California is ~~disbarred, suspended, resigned, or involuntarily inactive~~.

(Bb) A ~~member~~lawyer shall not employ, associate ~~professionally~~in practice with, or ~~aid~~assist a person\* the ~~member~~lawyer knows\* or reasonably should know\* is ~~a~~an ~~disbarred, suspended, resigned, or involuntarily inactive member~~ineligible person to perform the following on behalf of the ~~member's~~lawyer's client:

(1) Render legal consultation or advice to the client;

(2) Appear on behalf of a client in any hearing or proceeding or before any judicial officer, arbitrator, mediator, court, public agency, referee, magistrate, commissioner, or hearing officer;

(3) Appear as a representative of the client at a deposition or other discovery matter;

(4) Negotiate or transact any matter for or on behalf of the client with third parties;

(5) Receive, disburse or otherwise handle the client's funds; or

(6) Engage in activities ~~which~~that constitute the practice of law.

(Cc) A ~~member~~lawyer may employ, associate ~~professionally with, or aid a disbarred, suspended, resigned, or involuntarily inactive member~~in practice with, or assist

an ineligible person to perform research, drafting or clerical activities, including but not limited to:

- (1) Legal work of a preparatory nature, such as legal research, the assemblage of data and other necessary information, drafting of pleadings, briefs, and other similar documents;
  - (2) Direct communication with the client or third parties regarding matters such as scheduling, billing, updates, confirmation of receipt or sending of correspondence and messages; or
  - (3) Accompanying an active ~~member~~lawyer in attending a deposition or other discovery matter for the limited purpose of providing clerical assistance to the active ~~member~~lawyer who will appear as the representative of the client.
- (~~Dd~~) Prior to or at the time of employing, associating in practice with, or assisting a person\* the ~~member~~lawyer knows\* or reasonably should know\* is ~~an~~ disbarred, suspended, resigned, or involuntarily inactive member, the memberineligible person, the lawyer shall serve upon the State Bar written\* notice of the employment, including a full description of such person's current bar status. The written\* notice shall also list the activities prohibited in paragraph (~~bB~~) and state that the ~~disbarred, suspended, resigned, or involuntarily inactive member~~ineligible person will not perform such activities. The ~~member~~lawyer shall serve similar written\* notice upon each client on whose specific matter such person\* will work, prior to or at the time of employing, associating with, or assisting such person\* to work on the client's specific matter. The ~~member~~lawyer shall obtain proof of service of the client's written\* notice and shall retain such proof and a true and correct copy of the client's written\* notice for two years following termination of the ~~member's~~lawyer's employment ~~with~~by the client.
- (~~Ee~~) A ~~member~~lawyer may, without client or State Bar notification, employ ~~a disbarred, suspended, resigned, or involuntarily inactive member, associate in practice with, or assist an ineligible person~~ whose sole function is to perform office physical plant or equipment maintenance, courier or delivery services, catering, reception, typing or transcription, or other similar support activities.
- (~~Ff~~) ~~Upon termination of the disbarred, suspended, resigned, or involuntarily inactive member, the member~~When the lawyer no longer employs, associates in practice with, or assists the ineligible, the lawyer shall promptly serve upon the State Bar written\* notice of the termination.

### **Discussion**Comment

~~For discussion of the activities that constitute the practice of law, see *Farnham v. State Bar* (1976) 17 Cal.3d 605 [131 Cal.Rptr. 611]; *Bluestein v. State Bar* (1974) 13 Cal.3d 162 [118 Cal.Rptr. 175]; *Baron v. City of Los Angeles* (1970) 2 Cal.3d 535 [86 Cal.Rptr. 673]; *Crawford v. State Bar* (1960) 54 Cal.2d 659 [7 Cal.Rptr. 746]; *People v. Merchants*~~



~~*Protective Corporation* (1922) 189 Cal. 531, 535 [209 P. 363]; *People v. Landlords Professional Services* (1989) 215 Cal.App.3d 1599 [264 Cal.Rptr. 548]; and *People v. Sipper* (1943) 61 Cal.App.2d Supp. 844 [142 P.2d 960].)~~

~~Paragraph (D) is not intended to prevent or discourage a member from fully discussing with the client the activities that will be performed by the disbarred, suspended, resigned, or involuntarily inactive member on the client's matter. If a member's client~~if the client ~~is an organization, then the written~~lawyer shall serve the ~~notice required by paragraph (Dd) shall be served upon the~~on its ~~highest authorized officer, employee, or constituent overseeing the particular engagement. (See rule~~Rule 3-6001.13.~~)~~

~~Nothing in rule 1-311 shall be deemed to limit or preclude any activity engaged in pursuant to rules 9.40, 9.41, 9.42, and 9.44 of the California Rules of Court, or any local rule of a federal district court concerning admission *pro hac vice*.~~



**Proposed Rule 5.3.1 [1-311] Employment of Disbarred, Suspended,  
Resigned, or Involuntarily Inactive Lawyer  
Synopsis of Public Comments**

**TOTAL = 4**      **A = 2**  
**D = 1**  
**M = 1**  
**NI = 0**

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI <sup>1</sup>	Rule Section or Cmt.	Comment	RRC Response
2016-25a	McCue, Martin (08-02-16)	No	M	5.3.1	Some parts of this rule should also apply to employment of lawyers who have voluntarily elected inactive status. Using only the concept of “involuntary inactivity” creates a gap in the rule that does not make sense. A person who elects inactive status should not practice while inactive. They need not be “restricted” by an outside authority.	Proposed rule 5.3.1 is intended to regulate lawyers who are under some form of regulatory or disciplinary sanction not to practice law, i.e., those lawyers who are <i>involuntarily</i> inactive. Proposed rule 5.5 (b), on the other hand, regulates activities by those lawyers who are not admitted to practice law in California for other reasons, including those who <i>voluntarily</i> go on inactive status. The strict regimen of 5.3.1 is inappropriate for this latter group of lawyers, who can voluntarily elect to go back on active status.
X-2016-43ah	Committee on Professional Responsibility and Conduct (COPRAC) (Baldwin) (08-12-16)	Yes	A		Supports adoption of proposed Rule 5.3.1.	No response required.
X-2016-76p	Los Angeles County Bar Association (LACBA) – Professional Responsibility and Ethics Committee of Los Angeles (PREC) (Schmid) (09-24-16)	Yes	D		PREC urges the deletion of Proposed Rule 5.3.1 in its entirety. It has long been established that a lawyer who is suspended from practice and holds herself out as entitled to practice is engaged in the unauthorized practice of	The Commission disagrees with the commenter’s assessment of current rule 5.3.1.

<sup>1</sup> A = AGREE with proposed Rule      D = DISAGREE with proposed Rule      M = AGREE ONLY IF MODIFIED      NI = NOT INDICATED

**Proposed Rule 5.3.1 [1-311] Employment of Disbarred, Suspended,  
Resigned, or Involuntarily Inactive Lawyer  
Synopsis of Public Comments**

**TOTAL = 4**      **A = 2**  
**D = 1**  
**M = 1**  
**NI = 0**

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI <sup>1</sup>	Rule Section or Cmt.	Comment	RRC Response
					<p>law and is subject to sanctions. Current Rule 1-311, impacts the employment of restricted California lawyers by imposing certain duties upon the active lawyer/employers; its revised version, Proposed Rule 5.3.1, has similar features. There is no current rule that describes a lawyer's responsibilities with respect to the employment or retention of nonlawyers in general. Proposed Rule 5.3 would bridge that gap. It is substantially similar to ABA Model Rule 5.3.</p> <p>If adopted, Proposed Rule 5.3 would both obviate the need for, and highlight the substantial defects of, current Rule 1-311 and its proposed revision, 5.3.1. Those defects include the following:</p> <p>1. Proposed Rule 5.3.1 is punitive. The purpose of disciplinary proceedings is not to punish but to protect the courts and the public. The rule limits the activities of restricted California lawyers in ways that greatly exceed the boundaries set by <i>Birbrower, Montalbano, Condon &amp; Frank v. Superior</i></p>	<p>1. The commenter does not explain why rule 5.3.1 is "punitive." The purpose of the proposed Rule, which largely carries forward current rule 1-311, is to <i>restrict</i> the unauthorized practice of law by a disbarred, suspended or involuntarily inactive lawyer, but not prohibit that person</p>

**Proposed Rule 5.3.1 [1-311] Employment of Disbarred, Suspended,  
Resigned, or Involuntarily Inactive Lawyer  
Synopsis of Public Comments**

<b>TOTAL = 4</b>	<b>A = 2</b>
	<b>D = 1</b>
	<b>M = 1</b>
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No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI <sup>1</sup>	Rule Section or Cmt.	Comment	RRC Response
					<p><i>Court</i> for other lawyers not admitted in California without demonstrating an enhanced risk of harm. Where the restricted lawyer is involuntarily inactive for reasons other than discipline, the punitive effect is even more pronounced.</p> <p>2. Proposed Rule 5.3.1 imposes undue burdens on current practice. Strict compliance with the rule precludes the otherwise necessary and appropriate use of remote and online law-related services where the status of individual service providers cannot be ascertained. In addition, the reporting requirements are both onerous to potential employers and an unsustainable burden on the regulatory resources of the State Bar without demonstrating a commensurate risk to the public or the courts.</p>	<p>from working in a legal environment under lawyer supervision. The rule sets forth in precise terms what is expected of the employing lawyer who supervises a person who has been disbarred, suspended or placed on involuntarily inactive service. The Commission believes this provides a degree of public protection that would not be available with the rule's repeal.</p> <p>2. The commenter also criticizes the rule as imposing "undue burdens on current practice" because, theoretically, a lawyer might utilize "remote and online law-related services" where the status of service providers cannot be ascertained. The Commission believes this is a strained reading of the scope, purpose and intent of the rule. However, to the extent a lawyer is employing someone to engage in tasks covered by the rule, the lawyer is obligated to comply with the rule. There is no indication that the concerns raised by LACBA have caused problems</p>

**Proposed Rule 5.3.1 [1-311] Employment of Disbarred, Suspended,  
Resigned, or Involuntarily Inactive Lawyer  
Synopsis of Public Comments**

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	<b>D = 1</b>
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No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI <sup>1</sup>	Rule Section or Cmt.	Comment	RRC Response
					<p>3. Proposed Rule 5.3.1 frustrates rehabilitation. Disciplinary proceedings are designed to rehabilitate lawyers. The rule imposes significant disincentives for potential lawyer-employers to hire restricted lawyers as opposed to other nonlawyers. In so doing, the rule effectively deprives restricted lawyers of potential employment, which, in turn, impairs their ability to attain the present learning and ability in law required for rehabilitation. Proposed new rule 5.3 would provide valuable guidance for the use of nonlawyer assistants that is not available under the current rules and, and it would be appropriate for contemporary practice. In contrast, the proposed rule 5.3.1, would be rendered moot by 5.3 and is otherwise unduly burdensome to both practitioners and regulators. Proposed rule 5.3 should be adopted, and proposed rule 5.3.1 should be deleted in its entirety.</p> <p>In the event Proposed Rule 5.3.1</p>	<p>under the existing rule, and therefore the Commission does not believe the issue needs to be addressed further.</p> <p>3. The Commission also believes that the rule does not frustrate rehabilitation. The rule does not impose unreasonable disincentives, and the client and public's right to know that a person who is disbarred, suspended or involuntarily inactive is working on their case is a matter of public protection and outweighs the disincentives that exist by virtue of requiring disclosure of the employment status to the client.</p>

**Proposed Rule 5.3.1 [1-311] Employment of Disbarred, Suspended,  
Resigned, or Involuntarily Inactive Lawyer  
Synopsis of Public Comments**

<b>TOTAL = 4</b>	<b>A = 2</b>
	<b>D = 1</b>
	<b>M = 1</b>
	<b>NI = 0</b>

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI <sup>1</sup>	Rule Section or Cmt.	Comment	RRC Response
					<p>is not deleted, we have the following remaining comments on its current form:</p> <p>4. Proposed Rule 5.3.1(a) (3) and (4) each use the term “member,” despite the fact that that term has generally been eliminated in the proposed new rules, with the term “lawyer” being used in its place. Under these circumstances, the use of the term “member” in these subparagraphs, without reference to the term “lawyer,” may lead to confusion. It is also internally inconsistent with language of subparagraph (a)(5), as well as the title of the rule, which do use the term “lawyer.” To avoid this, we recommend that in subparagraphs (a)(3) and (4), the first use of the term “member” be replaced with the term “lawyer.” Under this approach, subparagraph (a)(3) would read, “(3) ‘Involuntarily inactive lawyer’ means a member who is ineligible to practice law as a result of action taken pursuant to Business and Professions Code §§ 6007, 6203(d)(1), or California Rule of Court 9.31(d).” Likewise, subparagraph (a)(4) would read, “(4) ‘Resigned lawyer’ means a</p>	<p>4. The Commission thanks the commenter but has not made the suggested changes to the rule. The term “member” is used because the rule as drafted applies only to the employment of <i>members</i> of the State Bar of California who have been disbarred, suspended or placed on involuntary inactive status.</p>

**Proposed Rule 5.3.1 [1-311] Employment of Disbarred, Suspended,  
Resigned, or Involuntarily Inactive Lawyer  
Synopsis of Public Comments**

<b>TOTAL = 4</b>	<b>A = 2</b>
	<b>D = 1</b>
	<b>M = 1</b>
	<b>NI = 0</b>

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI <sup>1</sup>	Rule Section or Cmt.	Comment	RRC Response
					member who has resigned from the State Bar while disciplinary charges are pending.” Finally, we read this proposed rule to prohibit a lawyer from assisting a restricted lawyer from negotiating any matter on behalf of a client. However, there are contexts (e.g., in transactional work) where attorneys appropriately work with investment bankers and business brokers in negotiating transactions. If a restricted lawyer is functioning in such a role (and not as an attorney), the transactional attorney should not be in violation of the rule. As a result, we recommend deleting the reference to “assisting”.	
X02016-104az	Office of Chief Trial Counsel (OCTC) (Dresser) (09-27-16)	Yes	A		Supports adoption of proposed Rule 5.3.1.	No response required.



**PROPOSED RULE OF PROFESSIONAL CONDUCT 5.6**  
**(Current Rule 1-500)**  
**Restrictions on a Lawyer's Right to Practice**

**EXECUTIVE SUMMARY**

The Commission for the Revision of the Rules of Professional Conduct ("Commission") has evaluated current rule 1-500 (Agreements Restricting a Member's Practice) in accordance with the Commission Charter, with a focus on the function of the rule as a disciplinary standard, and with the understanding that rule comments should be included only when necessary to explain a rule and not for providing aspirational guidance. In addition, the Commission considered the national standard of the American Bar Association ("ABA") counterpart, Model Rule 5.6 (Restrictions On Right To Practice). The Commission also reviewed relevant California statutes, rules, and case law relating to the issues addressed by the proposed rules. The result of the Commission's evaluation is proposed rule 5.6 (Restrictions on a Lawyer's Right to Practice). This proposed rule has been adopted by the Commission for submission to the Board of Trustees for public comment authorization. A final recommended rule will follow the public comment process.

The main issue considered was whether to add an express exception that would permit a restrictive partnership, or similar, agreement which is "authorized by law" in order to address the wide range of restrictive arrangements that a law firm might employ which do not constitute a violation of the current rule (see *Howard v. Babcock* (1993) 6 Cal.4th 409, 425). The Commission voted to recommend adoption of this exception. Furthermore, the Commission recommends adoption of the rule structure of Model Rule 5.6 to eliminate unnecessary differences with the national standard of Model Rule 5.6 and to facilitate compliance in the case of partnership agreements among multijurisdictional law firms.

Paragraph (a) restricts a lawyer from participating in offering or making: (1) a restrictive law firm partnership, or similar, agreement; and (2) a restrictive agreement as part of a settlement of a client's case or matter. Paragraph (a) continues the concept of the existing exception for agreements that concern benefits upon retirement (current rule 1-500(A)(1)). Paragraph also adds the exception described above that permits agreements authorized by law.

Paragraph (b) continues the existing prohibition against a lawyer participating in, offering or making an agreement which precludes the reporting of a violation of the rules. Although this concept is not in Model Rule 5.6, the Commission recommends that it be carried forward because it provides important public protection.

Paragraph (c) provides that the rule does not prohibit agreements that impose restrictions on practice as part of disciplinary proceedings. This continues paragraph (A)(3) of current rule 1-500.

Comment [1] cites to Business and Professions Code § 16602 and *Howard v. Babcock* (1993) 6 Cal.4th 409, 425 [25 Cal.Rptr.2d 80] concerning the application of the wide range of restrictive arrangements that law firms might employ.

Comment [2] explains how paragraph (a)(2) is applied, emphasizing that the terms of a settlement agreement cannot require that a lawyer refrain from representing other clients. This continues the guidance in the first Discussion paragraph in rule 1-500.

Comment [3] clarifies that the rule does not prohibit restrictions of the sale of a law practice, where agreements to sell a law practice will likely include a clause that restricts the selling lawyer's ability to continue practice and compete with the practice after it is sold.

## **Post-Public Comment Revisions**

The Commission did not revise the proposed rule in response to public comment.

## **Proposed Rule as Amended by the Board of Trustees on November 17, 2016**

After public comment, the Commission's proposed rule was considered by the Board of Trustees at its meeting on November 17, 2016. To continue the broad scope of current rule 1-500, the Board revised the proposed rule to provide that a lawyer shall not participate in offering or making an agreement that imposes a restriction on a lawyer's right to practice even if that agreement is not a partnership, shareholders, operating, employment, or other similar type of agreement and even if the agreement is not connected with a settlement of a client controversy.

The Board also revised the rule to make the prohibition on restrictive agreements subject to a general "authorized by law" exception. With these changes, the Board voted to authorize an additional 45-day public comment period on the proposed rule.

The redline strikeout text below shows the changes made by the Board:

- (a) ~~A~~Unless authorized by law, a lawyer shall not participate in offering or making:
- (1) a partnership, shareholders, operating, employment, or other similar type of agreement that restricts the right of a lawyer to practice after termination of the relationship, except an agreement that:~~—(i) concerns benefits upon retirement, or (ii) is authorized by law; or~~
  - (2) an agreement that imposes a restriction on a lawyer's right to practice in connection with a settlement of a client controversy, or otherwise~~in which a restriction on the lawyer's right to practice is part of the settlement of a client controversy.~~

\* \* \* \* \*

**Rule 5.6 [1-500] Restrictions on a Lawyer's Right to Practice  
(Commission's Proposed Rule Adopted on October 21–22, 2016  
as Amended by the Board on November 17, 2016 – Clean Version)**

- (a) Unless authorized by law, a lawyer shall not participate in offering or making:
  - (1) a partnership, shareholders, operating, employment, or other similar type of agreement that restricts the right of a lawyer to practice after termination of the relationship, except an agreement that: concerns benefits upon retirement, or
  - (2) an agreement that imposes a restriction on a lawyer's right to practice in connection with a settlement of a client controversy, or otherwise.
- (b) A lawyer shall not participate in offering or making an agreement which precludes the reporting of a violation of these rules.
- (c) This Rule does not prohibit an agreement that is authorized by Business and Professions Code §§ 6092.5(i) or 6093.

**Comment**

[1] Concerning the application of paragraph (a)(1), see Business and Professions Code § 16602; *Howard v. Babcock* (1993) 6 Cal.4th 409, 425 [25 Cal.Rptr.2d 80].

[2] Paragraph (a)(2) prohibits a lawyer from offering or agreeing not to represent other persons\* in connection with settling a claim on behalf of a client.

[3] This Rule does not prohibit restrictions that may be included in the terms of the sale of a law practice pursuant to Rule 1.17.



**Rule 5.6 [1-500] Restrictions on a Lawyer's Right to Practice  
(Commission's Proposed Rule Adopted on October 21–22, 2016 as Amended by  
the Board on November 17, 2016 – Redline to Public Comment Draft Version)**

- (a) ~~A~~Unless authorized by law, a lawyer shall not participate in offering or making:
- (1) a partnership, shareholders, operating, employment, or other similar type of agreement that restricts the right of a lawyer to practice after termination of the relationship, except an agreement that: ~~—(i) concerns benefits upon retirement, or (ii) is authorized by law; or~~
  - (2) an agreement that imposes a restriction on a lawyer's right to practice in connection with a settlement of a client controversy, or otherwise~~in which a restriction on the lawyer's right to practice is part of the settlement of a client controversy.~~
- (b) A lawyer shall not participate in offering or making an agreement which precludes the reporting of a violation of these rules.
- (c) This Rule does not prohibit an agreement that is authorized by Business and Professions Code §§ 6092.5(i) or 6093.

**Comment**

[1] Concerning the application of paragraph (a)(1)~~(iii)~~, see Business and Professions Code § 16602; *Howard v. Babcock* (1993) 6 Cal.4th 409, 425 [25 Cal.Rptr.2d 80].

[2] Paragraph (a)(2) prohibits a lawyer from offering or agreeing not to represent other persons\* in connection with settling a claim on behalf of a client.

[3] This Rule does not prohibit restrictions that may be included in the terms of the sale of a law practice pursuant to Rule 1.17.

**Rule 1-500 ~~Agreements Restricting a Member's~~**  
**[5.6] Restrictions on a Lawyer's Right to Practice**  
**(Redline Comparison of the Proposed Rule to Current California Rule)**

- (a) Unless authorized by law, a lawyer shall not participate in offering or making:
- (A1) ~~Aa member shall not be a party to or participate in offering or making an agreement, whether in connection with the settlement of a lawsuit or otherwise, if the agreement~~partnership, shareholders, operating, employment, or other similar type of agreement that restricts the right of a ~~member~~lawyer to practice ~~law~~after termination of the relationship, except ~~that this rule shall not prohibit such an agreement which~~that concerns benefits upon retirement, or
- (1) ~~Is a part of an employment, shareholders', or partnership agreement among members provided the restrictive agreement does not survive the termination of the employment, shareholder, or partnership relationship; or~~
- (2) ~~Requires payments to a member upon the member's retirement from the practice of law; or~~an agreement that imposes a restriction on the lawyer's right to practice is part of the settlement of a client controversy, or otherwise.
- (3) ~~Is authorized by Business and Professions Code sections 6092.5 subdivision (i), or 6093.~~
- (Bb) A ~~member~~lawyer shall not ~~be a party to or~~ participate in offering or making an agreement which precludes the reporting of a violation of these rules.
- (c) This Rule does not prohibit an agreement that is authorized by Business and Professions Code §§ 6092.5(i) or 6093.

**Discussion****Comment**

~~Paragraph (A) makes it clear that the practice, in connection with settlement agreements, of proposing that a member refrain from representing other clients in similar litigation, is prohibited. Neither counsel may demand or suggest such provisions nor may opposing counsel accede or agree to such provisions.~~

~~Paragraph (A) permits a restrictive covenant in a law corporation, partnership, or employment agreement. The law corporation shareholder, partner, or associate may agree not to have a separate practice during the existence of the relationship; however, upon termination of the relationship (whether voluntary or involuntary), the member is free to practice law without any contractual restriction except in the case of retirement from the active practice of law.~~

[1] Concerning the application of paragraph (a)(1), see Business and Professions Code § 16602; *Howard v. Babcock* (1993) 6 Cal.4th 409, 425 [25 Cal.Rptr.2d 80].

[2] Paragraph (a)(2) prohibits a lawyer from offering or agreeing not to represent other persons\* in connection with settling a claim on behalf of a client.

[3] This Rule does not prohibit restrictions that may be included in the terms of the sale of a law practice pursuant to Rule 1.17.





**Proposed Rule 5.6 [1-500] Restrictions on Lawyer's Right to Practice  
Synopsis of Public Comments**

<b>TOTAL = 2</b>	<b>A = 2</b>
	<b>D = 0</b>
	<b>M = 0</b>
	<b>NI = 0</b>

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI <sup>1</sup>	Rule Section or Cmt.	Comment	RRC Response
X-2016-43ai	Committee on Professional Responsibility and Conduct (COPRAC) (Baldwin) (08-18-16)	Yes	A	5.6	COPRAC supports the adoption of proposed Rule 5.6.	No response required.
X-2016-104bc	Office of Chief Trial Counsel (OCTC) (Dresser) (09-27-16)	Yes	A	5.6	<p>OCTC supports this rule and Comments 1 and 3</p> <p>OCTC is concerned that Comment 2 is unnecessary and merely repeats the rule.</p>	<p>No response required.</p> <p>The Commission did not delete Comment [2] because it explains how paragraph (a)(2) is applied, emphasizing that the terms of a settlement agreement may not require that a lawyer refrain from representing other clients. This explanation is being carried forward from the first Discussion paragraph found in current rule 1-500 and deleting it might cause confusion as to whether this explanation remains true for the proposed rule.</p>

<sup>1</sup> A = AGREE with proposed Rule

D = DISAGREE with proposed Rule

M = AGREE ONLY IF MODIFIED

NI = NOT INDICATED



**PROPOSED RULE OF PROFESSIONAL CONDUCT 8.1.1**  
**(Current Rule 1-110)**  
**Compliance with Conditions of Discipline and Agreements in Lieu of Discipline**

**EXECUTIVE SUMMARY**

The Commission for the Revision of the Rules of Professional Conduct (“Commission”) has evaluated current rule 1-110 (Disciplinary Authority of the State Bar) in accordance with the Commission Charter, with a focus on the function of the rule as a disciplinary standard, and with the understanding that the rule comments should be included only when necessary to explain a rule and not for providing aspirational guidance. There is no corresponding American Bar Association (“ABA”) Model Rule to current rule 1-110. However, there is a comparable rule 10(B) in the ABA Model Rules for Lawyer Disciplinary Enforcement. The result of the Commission’s evaluation is proposed rule 8.1.1 (Compliance with Conditions of Discipline and Agreements in Lieu of Discipline). This proposed rule has been adopted by the Commission for submission to the Board of Trustees for public comment authorization. A final recommended rule will follow the public comment process.

Current rule 1-110 states: “A member shall comply with conditions attached to public or private reprovals or other discipline administered by the State Bar pursuant to Business and Professions Code sections 6077 and 6078 and rule 9.19 California Rules of Court.” Rule 10(B) of the ABA Model Rules for Lawyer Disciplinary Enforcement provides that “[w]ritten conditions may be attached to an admonition or a reprimand. Failure to comply with such conditions shall be grounds for reconsideration of the matter and prosecution of formal charges against the respondent.”

The Commission is recommending two clarifying revisions to the current rule. First, the Commission is recommending the addition of a reference to “an agreement in lieu of discipline.” An agreement in lieu of discipline is a disposition of a disciplinary matter that might include “conditions” with which a lawyer should be required to comply. Second, the Commission is recommending substituting the phrase “the terms and conditions” for “conditions” as the former is a more inclusive reference than the later. The Commission believes that both changes further the function of the rule as a charging vehicle that helps assure that lawyers can be held accountable if terms or conditions of a disciplinary disposition are violated.

The single comment recommended in proposed rule 8.1.1, recognizes that there are other provisions which also require a lawyer to comply with conditions of discipline. See e.g., Business and Professions Code § 6068 subdivisions (k) and (l).

**Post-Public Comment Revisions**

The Commission did not revise the proposed rule in response to public comment.

**Proposed Rule as Amended by the Board of Trustees on November 17, 2016**

After public comment, the Commission submitted its proposed rule for consideration by the Board of Trustees at the Board’s meeting on November 17, 2016. The Board revised the rule to address a possible ambiguity that might incorrectly suggest that an agreement in lieu of discipline constitutes a form of discipline. While no substantive change was made, the Board changed the order in which the rule lists the compliance obligations included within the rule to

distinguish an agreement in lieu of discipline from public or private reprovls or other discipline administered by the State Bar. With this change, the Board voted to adopt the proposed rule for submission to the Supreme Court of California for approval as a part of the State Bar's anticipated comprehensive amendments to the rules.

The redline strikeout text below shows the changes made by the Board:

\* \* \* \* \*

A lawyer shall comply with the terms and conditions attached to any ~~agreement in lieu of discipline, any~~ public or private reprovls, or to other discipline administered by the State Bar pursuant to Business and Professions Code §§ 6077 and 6078 and California Rules of Court, rule 9.19 or any agreement in lieu of discipline.

\* \* \* \* \*

**Rule 8.1.1 [1-110] Compliance with Conditions of Discipline  
and Agreements in Lieu of Discipline  
(Commission's Proposed Rule Adopted on October 21–22, 2016  
as Amended by the Board on November 17, 2016– Clean Version)**

A lawyer shall comply with the terms and conditions attached to any public or private reproof or to other discipline administered by the State Bar pursuant to Business and Professions Code §§ 6077 and 6078 and California Rules of Court, rule 9.19 or any agreement in lieu of discipline.

**Comment**

Other provisions also require a lawyer to comply with agreements in lieu of discipline and conditions of discipline. See e.g., Business and Professions Code § 6068, (k) and (l).



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**Rule 8.1.1 [1-110] Compliance with Conditions of Discipline  
and Agreements in Lieu of Discipline  
(Commission's Proposed Rule Adopted on October 21–22, 2016 as Amended by  
the Board on November 17, 2016 – Redline to Public Comment Draft Version)**

A lawyer shall comply with the terms and conditions attached to any ~~agreement in lieu of discipline, any~~ public or private reproof, or to other discipline administered by the State Bar pursuant to Business and Professions Code §§ 6077 and 6078 and California Rules of Court, rule 9.19 or any agreement in lieu of discipline.

**Comment**

Other provisions also require a lawyer to comply with agreements in lieu of discipline and conditions of discipline. See e.g., Business and Professions Code § 6068, (k) and (l).

**Rule ~~8.1.1 [1-110]~~ ~~Disciplinary Authority of the State Bar~~ Compliance with Conditions of Discipline and Agreements in Lieu of Discipline**  
**(Redline Comparison of the Proposed Rule to Current California Rule)**

A ~~member~~lawyer shall comply with the terms and conditions attached to any public or private ~~reprevals or~~reproval or to other discipline administered by the State Bar pursuant to Business and Professions Code ~~sections~~§§ 6077 and 6078 and ~~rule 9.19~~, California Rules of Court, rule 9.19 or any agreement in lieu of discipline.

**Comment**

Other provisions also require a lawyer to comply with agreements in lieu of discipline and conditions of discipline. See e.g., Business and Professions Code § 6068, (k) and (l).



**Proposed Rule 8.1.1 [1-110] Compliance with Conditions of Discipline  
and Agreements in Lieu of Discipline  
Synopsis of Public Comments**

**TOTAL = 3**      **A = 2**  
**D = 0**  
**M = 1**  
**NI = 0**

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI <sup>1</sup>	Rule Section or Cmt.	Comment	RRC Response NI = 0
X-2016-43an	Committee on Professional Responsibility and Conduct (COPRAC) (Baldwin) (08-12-16)	Yes	A		Supports adoption of proposed Rule 8.1.1.	No response required.
X-2016-76v	Los Angeles County Bar Association (LACBA) – Professional Responsibility and Ethics Committee of Los Angeles (PREC) (Schmid) (09-24-16)	Yes	M		PREC recommends that reference in Proposed Rule 8.1.1 [Compliance with Conditions of Discipline and Agreements in Lieu of Discipline (current Rule 1-110)] to “any agreement in lieu of discipline” be deleted as it is unnecessary. Violations of agreements in lieu of discipline already constitute a violation of Business and Professions Code section 6068, subdivision (I). There is no need for a rule that also addresses violations of agreements in lieu of discipline.	The Commission has not made the suggested change. The Commission continues to believe that including the term “agreement in lieu of discipline” removes ambiguity concerning a member’s duties under disciplinary orders and such agreements and emphasizes the importance of strict compliance with such orders and agreements.
X-2016-104bl	Office of Chief Trial Counsel (OCTC) (Dresser) (09-27-16)	Yes	A		Supports adoption of proposed Rule 8.1.1 and its comments.	No response required.

<sup>1</sup> A = AGREE with proposed Rule      D = DISAGREE with proposed Rule      M = AGREE ONLY IF MODIFIED      NI = NOT INDICATED

